Date: 20241220

Files: 560-02-41418 and 43143
and 566-02-42421 and 43435

Citation: 2024 FPSLREB 180

Federal Public Sector Labour Relations and Employment Board Act and *Canada Labour Code*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

GHANI OSMAN

Complainant and Grievor

and

TREASURY BOARD
(Department of Employment and Social Development)

Respondent and Employer

Indexed as
Osman v. Treasury Board (Department of Employment and Social Development)

In the matter of complaints made under section 133 of the *Canada Labour Code* and individual grievances referred to adjudication under section 209(1)(b) and (c) of the *Federal Public Sector Labour Relations Act*

Before: Caroline E. Engmann, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant and Grievor: Himself

For the Respondent and Employer: Jena Montgomery, counsel

Heard via videoconference,
November 21 to 25 and 30, 2022.

REASONS FOR DECISION

I. Summary of the complaints and grievances before the Board

[1] The following four files are before the Federal Public Sector Labour Relations and Employment Board ("the Board"): two complaints made under s. 133 of the *Canada Labour Code* (R.S.C., 1985, c. L-2; "the *Code*", in Board file nos. 560-02-41418 and 43143), and two individual grievances referred to the Board for adjudication under ss. 209(1)(b) and (c)(i) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*", in Board file nos. 566-02-42421 and 43435). All four matters stem from a series of events that occurred between December 2019 and June 2021 ("the relevant period"); therefore, these matters were heard together.

[2] In this decision, "the Board" refers to the present Board and all its predecessors.

[3] Ghani Osman ("the complainant" or "the grievor") worked as an information management analyst classified at the AS-01 group and level at the Department of Employment and Social Development, also known as Employment and Social Development Canada ("ESDC", "the respondent", or "the employer"). The employer became concerned about his fitness for duty because of certain email correspondence he sent to his managers and others in the workplace over a brief period between December 2019 and January 7, 2020, as well as changes observed in his overall behaviour.

[4] Starting on January 7, 2020, the employer placed him on leave with pay for other reasons, pending the completion of a fitness to work evaluation ("FTWE"). Initially, the grievor agreed to undergo the FTWE and secured an appointment with his personal physician in June 2020. The process of obtaining the FTWE continued over an extended period, during which the grievor debated its necessity with the employer.

[5] After approximately 17 months of efforts to obtain the required information, the employer terminated his employment on June 9, 2021, citing his refusal to participate in good faith in the process to return him to the workplace.

II. Summary of Findings

A. Grievance in Board file no. 566-02-42421 — change to leave status

[6] On September 24, 2020, the employer informed the grievor that effective October 26, 2020, he would be placed on sick leave with pay until his sick leave credits were exhausted. After that, he would be placed on sick leave without pay. He filed a grievance against this decision on October 24, 2020, alleging that it was disguised disciplinary action. He referred it to adjudication on January 1, 2021, under s. 209(1)(b) of the *Act*, alleging that it was disciplinary action resulting in a financial penalty.

[7] Based on the evidence, I do not find that the employer's action of changing the grievor's leave status on October 24, 2020, was disguised disciplinary action. Therefore, I deny this grievance.

B. Grievance in Board file no 566-02-43435 — termination of employment

[8] On July 6, 2021, the grievor filed a grievance against the termination of his employment. He referred it to the Board for adjudication on August 27, 2021, under s. 209(1)(c)(i) of the *Act*. The employer raised an objection to the Board's jurisdiction on the basis that the grievance was untimely.

[9] Based on the evidence, I find that the grievance was timely, and the employer's objection to the Board's jurisdiction to hear the grievance is dismissed.

[10] I deny the grievance as I find that the employer established cause for the termination. At the termination date, the grievor failed to meet a condition of employment, namely, providing an FTWE to the employer.

C. Board file nos. 560-02-41418 and 43143 — reprisal complaints under s. 133 of the *Code*

[11] The two reprisal complaints allege that the respondent retaliated against the complainant following the exercise of his right under s. 128 of the *Code* to refuse to work due to a perceived danger in the workplace on December 22, 2019 ("the refusal-to-work complaint"). He made the first reprisal complaint on January 8, 2020, and the second one on June 16, 2021. Both are based on the refusal-to-work complaint.

1. The first reprisal complaint — file no. 560-02-41418 — threat of a future disciplinary hearing

[12] On December 22, 2019, the complainant informed the respondent that he was exercising his rights under the *Code* to refuse work due to encounters he had with another employee (in this decision, I shall refer to this employee as "GC") on November 29 and December 20, 2019. During both encounters, he alleged that GC told him this: "You're being watched, and on the watch list." As a result, on December 23, 2019, the respondent informed him that he was to work from home and that it would launch an investigation into the refusal-to-work complaint.

[13] On January 7, 2020, the complainant emailed GC, copying his manager, accusing GC of being a coward and warning that the next time GC terrorized him in a public setting, the complainant would defend himself "by all [and] any mean[s]" and that he was "not afraid of anymore [*sic*] consequences".

[14] Upon receipt of this email, the respondent informed the complainant that it was "… significantly concerned with the threatening nature and tone …" of his email communications and that it would hold a disciplinary hearing in the future to address his conduct. Before any disciplinary hearing would be held, it informed him that effective immediately, it was placing him on leave with pay until he had been assessed by a medical practitioner because it was concerned about his overall well-being and his current state of mind. It removed his workplace accesses and suspended the investigation of the refusal-to-work complaint.

[15] The complainant made the first reprisal complaint on January 8, 2020. Although the specific acts or inactions are not concisely articulated, as required by section 3 of the Board's Form 26, he attached two emails, dated December 23, 2019, and January 7, 2020, which he received from the respondent. The first required him to work from home pending the investigation of the refusal-to-work complaint. The second informed him that a disciplinary hearing would be convened in the future to address the threatening email that he sent to GC and others in the workplace. The respondent informed him that before it would consider discipline, it was placing him on leave with pay until a medical professional evaluated him.

[16] Based on the evidence, I do not find that the required causation or direct link exists to support a finding of retaliation within the meaning of s. 147 of the *Code*.

Although there is a factual nexus between the content of the complainant's January 7, 2020, email to GC and the threat of a future disciplinary action, that alone is not sufficient to establish retaliation. The threat of disciplinary action must have been made because of the complainant exercised his right to refuse work under Part II of the Code. In this case, the respondent provided uncontested evidence that the threat of a future disciplinary action was because of the inappropriate and threatening email that the complainant sent.

[17] I therefore dismiss the complaint.

2. The second reprisal complaint — file no. 560-02-43143 — termination of employment

[18] The complainant made the second complaint on June 16, 2021, alleging that the respondent's termination of his employment was a reprisal within the meaning of s. 147 of the *Code*. In addition to the refusal-to-work complaint, he alleged that the termination of his employment was done because he refused to go through with a psychiatric evaluation, as the respondent requested.

[19] Based on the evidence, I dismiss this complaint, for two reasons. First, there is no direct link between the refusal-to-work complaint, made in December 2019, and the termination of the complainant's employment on June 9, 2021. Second, in the circumstances of this case, requiring an employee to undergo an FTWE, psychiatric or otherwise, does not fall within the matters proscribed by s. 147 of the *Code*.

III. Summary of the evidence

[20] The parties provided a three-volume joint book of documents containing emails that they exchanged during the relevant period as well as other documents was admitted into evidence on consent. Also admitted into evidence were the following: "Ghani Osman: Book of Documents", tabs B and E; "Ghani Osman Leave Record for the period 01/01/2019 to 31/03/2024"; and an email dated April 17, 2021, from the grievor to Michel Charette about a facilitated discussion.

[21] The documentary evidence was voluminous; I have carefully reviewed all this evidence in addition to the oral testimonies.

[22] I note that certain documents had redactions when they were submitted to the Board. I understood that these redactions pertained to personal information such as

dates of birth, addresses and other identifying information that were not relevant to the matters at issue. The complainant requested that his medical information be protected. This request will be address later on in these reasons.

[23] I have taken the liberty of quoting extensively from the parties' email exchanges during the relevant period to provide a fair and objective narration of the facts.

A. For the employer

[24] Two managers and one director of the employer's Human Resources Services Branch ("the HRS Branch") where the grievor worked testified on the employer's behalf. Charles Côté was the manager of the Business Management Services for the HRS Branch between August 2019 and June 2020, and the grievor reported to him through a team leader. Karyne Paradis took over from Mr. Côté in June 2020. Mr. Charette became the HRS Branch's director in March 2020 and was the direct supervisor of both Mr. Côté and Ms. Paradis at the relevant times. All three witnesses interacted with the grievor at different times during the relevant period.

1. Mr. Côté's evidence

[25] Mr. Côté was the grievor's manager from August 2019 to June 2020. The grievor reported to him through a team leader. Before December 2019, he had a good working relationship with the grievor.

[26] On December 21, 2019, he received an email from the grievor that stated as follows:

> *Hello Charles Cote and Stacey,*
>
> *I recently reported a situation with Toronto Police and I was provided with a reporting ID number. I have documented the situation the day it occurred. The officer also instructed me to advise the employer. I had a great difficulty with this individual and channels available in the workplace did not help me feel safe at the workplace.*
>
> *Recently outside of the workplace there was an incident that took place involving* [GC] *at the Sheppard Station (Toronto Transit) which was threatening to me.* ***I am close to a point where I will defend myself by all means.***
>
> *My safety in the workplace and outside the workplace is being compromised by this individual. I am seeking professional consultation about this matter.*
>
> *Ghani*

[Emphasis added]

[27] On December 22, 2019, in his refusal-to-work complaint, the complainant informed the employer that he was exercising his right to refuse dangerous work under s. 128 of the *Code* as follows:

> …
>
> *I'm advising the Employer that I am exercising my right to refuse dangerous work under Part II of the Canada Labour Code, specifically under section 128 of the Code, on the basis that I am repeatedly being exposed to dangerous situations that's threatening my life.*
>
> …
>
> *The issue centers on a threat by* [GC] *on November 29th 2019 at 4:10pm inside the TTC subway train going Southbound, and December 20th 2019 during my lunch break at the Sheppard Centre. I reported these events to the Toronto Police after leaving work on December 20th 2019 at the 33 Division.*
>
> *November 29th: Upon entering the train after leaving work,* [GC] *who was already seated spots me and makes remarks to me to say that "You're a being watched, and on the watchlist" I continued on and walked passed him to other side of the train while he remained seated.*
>
> *Same incident occurred and a same remark was said on December 20th 2019. This individual is psychologically attacking me and I feel threaten by his remarks. I was shaken by his remarks during that afternoon, but continued to finish my working day on December 20 2019. After work, on December 20th 2019, I reported this situation to the Toronto Police, who also advised me to instruct the employer about this situation.*
>
> …
>
> [*Sic* throughout]

[28] On the same date, he acknowledged the grievor's refusal-to-work complaint and asked him to work from home, pending an investigation. He stated as follows:

> …
>
> *I acknowledged receipt of your e-mails sent to me and other teams* [*sic*] *members during the weekend.*
>
> *At the outset, I want to stress that we take this matter very seriously. To that end, I will be organizing a meeting with you shortly to discuss and investigate the Refusal to Work complaint and the next steps in the process. Please note that you can be accompanied during this meeting if you so wish.*

> ***In the interim, given that you have a laptop and remote access, I would ask that you work from home until further notice. Valerie or myself will be communicating with you shortly regarding work assignments.***
>
> ***I am also concerned about your overall well-being****. ESDC is committed to safety and health in all of its workplaces. I understand the situation may be stressful and I would like to remind you that the Employee Assistance Program (EAP) offers voluntary and confidential services. If you would like more information on their services, please call* ***1-800****-*[redacted].
>
> …
>
> [Emphasis added]

[29] He testified that he was concerned about the grievor's following statement: "… I will defend myself by all means", as he did not know what the grievor meant by that. That is why he asked the grievor to work from home. His concern was heightened by the subsequent flurry of emails that he received from the grievor, which led him to place the grievor on leave with pay in January 2020 and to remove his workplace access. The culminating email was sent on January 7, 2020. It was addressed to GC and copied to him as well as three other ESDC officials, and it stated as follows ("the Watch List email"):

> *Subject: You say I am on the "Watch List"*
>
> *Hello Sir,*
>
> *You are a coward* [GC]*. You robbed me out of many employment opportunities after your managerial friends induced me into a fraud contract to settle. I was placed in a box and threaten many times over since.*
>
> *You labelled me a terrorist in front of our colleagues and not a single one was able to speak against you. You benefit from your whiteness which allows you to speak like that, and still continue to terrorize me after work in a public setting. Please note, the next time you continue to terrorize me in a public place I will defend myself by all any mean. I am not afraid of anymore consequences from now on.*
>
> [Name redacted] *you've accommodated me to unit that I left in bad terms, with many angry people with hostility towards me. This was not fair, but I wanted to make you aware of how I am feeling before they punish me.*
>
> *Again, you're a coward* [GC] *and your protectors are cowards. I do not care of any type of disciplinary actions at this point but I wanted to make you aware of how your actions are cowardly.*
>
> [*Sic* throughout]

[30] He responded to the Watch List email as follows ("the FTWE suspension email"):

> *Hello Ghani,*
>
> *I acknowledge receipt of your email below as well as the numerous emails sent since yesterday.*
>
> ***I am significantly concerned with the threatening nature and tone of your email below, which is completely inappropriate and will not be tolerated. To that end, a disciplinary hearing will be organized at a date and time to be confirmed later.***
>
> ***In the interim, and prior to holding this disciplinary hearing, I must ensure the health and safety of the work environment. Your numerous emails and their content raise significant concerns vis-à-vis your overall well-being and current state of mind.***
>
> *Consequently, I have taken the decision to place you on leave with pay until such time as you are assessed by a medical professional. A letter will be prepared which you will be expected to take to this medical professional.*
>
> ***At this time, I am instructing as follows:***
>
> ***• Do not report to work or access the premises at4900 Yonge; and,***
>
> ***• Do not communicate with anyone at ESDC, except myself.***
>
> ***Please note that until further notice, your systems and building access have been removed. I will require your personal contact information in order to communicate with you.***
>
> *The Employer takes seriously your work refusal but in your best interest and to ensure fairness in the process, the scheduled interview will be put on hold until further notice.*
>
> *I would like to remind you that the Employee Assistance Program (EAP) is available to assist you at any time at 1-800-*[redacted]
>
> [Emphasis added]

[31] Given the tone and contents of the grievor's emails, he had concerns for the grievor's health and for the health and safety of his workplace colleagues; therefore, he asked the grievor to undergo an FTWE. He explained this in the letter to the grievor's doctor of January 21, 2020 ("the FTWE letter"), as follows:

> …
>
> *The fact that Mr. Osman felt the need to send multiple messages within a 48-hour window, as well as their inappropriate tone and content which was threatening in nature, has raised serious concerns with regards to Mr. Osman's overall well-being and current state of mind. Aside from the content itself, consideration*

is also given to the way in which this situation has escalated so rapidly.

As a result of this behaviour, and management's obligation to both support Mr. Osman's health and safety but also of the entire work environment, Mr. Osman was placed on leave with pay until he is assessed by a medical professional (Appendix 7). It is in this context that we are seeking your medical opinion. We understand that in the past, Mr. Osman has provided documentation attesting that he has no functional limitations associated with exercising his specific duties. This being said, although we are not noting issues with his performance, there are certainly concerns as it relates to his ability to successfully occupy the position without impacting his well-being or the well-being of others.

Although I have only been Mr. Osman's manager since July 2019, it is my understanding that he has had issues with [GC] *in the past, that recourses were used and that conclusions were rendered. However, what I gather from the recent events it [sic] that Mr. Osman does not agree with the conclusions provided and remains affected by past situations as well as more recently reported incidents.*

Based the above and upon review of the provided supporting documentation, I would greatly appreciate [sic] *if you could respond to the following questions:*

1. Can you please confirm whether Mr. Osman is fit to work, which entails completing the duties associated with his position in a manner as to respect the values and behaviours established within the ESDC Code of Conduct? (Appendix 8)

2. If Mr. Osman is fit to work:

a) Is he fit to work on a full time [sic] or a part-time basis?

b) Is he fit to work from 4900 Yonge Street?

3. Does Mr. Osman have any functional limitations or restrictions that need to be accommodated in the workplace? Please specify the limitations or restrictions and whether they are permanent or temporary.

4. If Mr. Osman has functional limitations:

a) Does it impact his ability to complete the duties associated with his position in a manner as to respect the values and behaviours established within the ESDC Code of Conduct? If so, please explain.

b) Is there a causal relation between Mr. Osman's medical condition and the behaviour stated above? If so, please explain.

c) Are there any triggers that may or could impact Mr. Osman in the workplace? If so, please provide details and any measures that could be implemented to help.

> *5. Does Mr. Osman represent a danger to himself and/or to others in the workplace? To this end, and based on his email of January 7, 2020, is there reason to believe that he could present a danger specifically to* [GC]*?*
>
> *6. Please provide any information that could be relevant for the employer regarding this situation.*
>
> …

[32] Although he found the Watch List email inappropriate and worthy of discipline, he was prepared to put the discipline on hold until he satisfied himself that the grievor was fit to be in the workplace. He wanted to prevent any workplace conflicts and anything that would endanger any of his staff. The grievor's emails were unacceptable, and as a manager, he had to address them, but he also had to be objective. He did not personally know GC but knew that he was an ESDC employee. In the end, he did not hold any disciplinary hearing with the grievor because he was waiting for the medical assessment.

[33] To ensure that there was no medical basis for the grievor's behaviour, he placed the grievor on leave with pay so that there would be no financial hardship for him. His involvement with the grievor ended in June 2020.

[34] As the manager, he was responsible for the safety of all employees, including the grievor. He removed the grievor from the workplace because he had concerns with the grievor's overall well-being and with workplace safety. He was willing to have the grievor return to work and to support his full reintegration to the workplace.

[35] He treated the refusal-to-work complaint and the FTWE as two separate issues. The complaint was not a factor in removing the grievor from the workplace in January 2020; nor was it a factor in seeking medical clarifications. He removed the grievor from the workplace because of his behaviour.

[36] He did not receive any documentation from the Toronto Police Service in Toronto, Ontario, about the grievor's statement that he reported the GC incident to them. The grievor did not provide any video recordings of the alleged incidents. There was no need for him to investigate the refusal-to-work complaint in person because he found that the emails were sufficient for his investigation. In addition, he could obtain any additional information by email or telephone. Consistent with this approach, he

emailed the grievor on January 24, 2020, outlining three questions for grievor to answer.

[37] On February 7, 2020, the grievor responded as follows:

> *This is for the record.*
>
> *Please do not harass me or contact me about work refusal investigation when you have removed me from my workplace and state that you have a "serious concerns" about my health. On one hand you claim to have "concerns about my health" and yet you continue to invite me to investigations when I am not at work to participate. You have prevented me to be present after I made a request to be present.*
>
> *This contradictory demands further strengths when I say your demand for me to go through medical assessment is in bad faith and strategy to cover the workplace hate that I faced from* [GC]*.*
>
> *I am waiting for an appointment date to discuss with my physician about this treatment. You are representative an employee of Government of Canada, and you choose to be this discriminatory. I hope to respond to you after I see my physician and the assessment is done.*
>
> [*Sic* throughout]

[38] On February 26, 2020, the grievor emailed him and stated that he would make a harassment complaint against him. He knew that the grievor made a harassment complaint against him, but he did not recall what happened to it.

[39] He did not consider the grievor to be a danger; he required a medical assessment to ascertain whether the grievor was well enough to be in the workplace.

[40] He completed the investigation of the grievor's refusal-to-work complaint and concluded that there was no danger to the grievor in the workplace. The work refusal was then referred to the Occupational Health and Safety Committee, which also concluded that there was no danger in the workplace to the grievor. He believed that the matter was currently pending before the Canada Industrial Relations Board ("the CIRB").

[41] On April 19, 2020, the grievor wrote to him as follows:

> *Hello Mr. Cote,*
>
> *On January 7th 2020, you placed me on leave and communicated to me that I will go through a disciplinary hearing.* ***You***

> ***threatened me with disciplinary without looking into the matter of* [GC] *targeting me because of my Muslim faith. I simply insisted that I will defend myself in the face of hate. You then considered that I was in danger to him.***
>
> *You initially said that that you will postpone the hearing to my work refusal investigation, but then decided to investigate and and issue a response to my work refusal while I was on leave, and disregarded my participation and request to be present. You continued to harass me while on leave to conduct the investigation behind my back.*
>
> *Currently, my work refusal complaint is sitting with the OHS committee and I requested that I want to be present while the investigation is being conducted so that this investigation is not tainted like your investigation.*
>
> …
>
> [*Sic* throughout]
>
> [Emphasis added]

[42] When asked about the grievor's statement that he considered the grievor to be a danger to GC, he insisted that he did not consider the grievor to be a danger because he did not have the medical expertise to make that determination. He did not know what the grievor meant by "defend myself by all means"; it could have meant anything. Therefore, as a manager, he had to address the situation.

[43] The grievor informed the employer that he had an appointment with a doctor on June 10, 2020, in connection with the FTWE. He was hopeful that he would receive the necessary information so that he could address the grievor's work situation. He left his position in June 2020 and had no further role in the grievor's file.

[44] On cross-examination, he explained that he requested the FTWE because of the tone and content of the flurry of emails that the grievor sent between December 20, 2019, and January 7, 2020. He found the reference to "defend myself by all means" particularly concerning for him because he was unsure what that entailed. He did not agree with the grievor's suggestion in cross-examination that the phrase could refer to taking the necessary recourse.

2. Ms. Paradis' evidence

[45] Ms. Paradis started as a manager in the Business Management Services section of the HRS Branch in April 2020, and she reported directly to Mr. Charette. The grievor reported to her through a team leader. Her direct involvement in the grievor's file was

from mid-June 2020 to the end of February 2021, when Mr. Charette took direct charge of it. Other than one telephone call with the grievor toward the end of July 2020, all her interactions with him were through email exchanges.

[46] On June 17, 2020, she emailed the grievor, introducing herself as the new manager taking over from Mr. Côté. She acknowledged that Mr. Côté informed her that the grievor had been in hospital, and she inquired about his health and provided information about the Employee Assistance Program. She also asked him to send the FTWE results directly to her.

[47] The grievor responded the same day as follows:

…

> *Nice virtually meeting you.*
>
> *I wanted to provide you with an update. On June 10th my physician* [*sic*] *office arranged a virtual meeting between myself and the doctor.*
>
> *The letter from the employer was recently submitted to the doctor [sic] office. The doctor has ordered me to another meeting scheduled on July 8th. I will forward you the document as soon as I receive it.*

…

[48] She had a telephone conversation with the grievor on July 31, 2020, during which the grievor explained to her that his doctor did not want to rush him back to work and that his doctor would prepare the report on his own schedule. The grievor also suggested that the employer could send him to Health Canada for the evaluation.

[49] During this conversation, he informed her that he was bothered by the pandemic although he had not been infected. He was also bothered by the ongoing demonstrations in the United States around the killing of George Floyd. According to her, they had a good discussion and the grievor was very courteous throughout.

[50] She was off in the summer. When she returned in September, she reached out to the grievor to see if there was any update.

[51] Her role was to follow up on the FTWE and to obtain the documentation. She offered to reach out directly to the grievor's physician to try to expedite the process, but he told her not to bother his physician. She discussed with him the possibility of

having the FTWE done through Health Canada if his physician took too long to complete it.

[52] As for the independent medical evaluator (IME), who in this decision is referred to as "Dr. BB", she testified that the employer selected a physician within the same area of specialization as the grievor's physician. She secured an appointment toward the end of September 2020 and early October with the IME for the grievor, but it was cancelled because the grievor informed her that he was not interested in participating with the IME. Instead, he said that he preferred Health Canada to evaluate him or to wait for his physician to complete the report.

[53] On October 23, 2020, Ms. Paradis wrote to the grievor as follows:

> *Good afternoon Mr Osman,*
>
> *Dr.* [BB] *is an Independent Medical Evaluator (IME) and there is no difference between his role and a Health Canada Medical Evaluator. We opted to offer you this solution to allow you to address the issue quickly and for you to reintegrate our team and also because you proposed to be evaluated by Health Canada. The type of doctor chosen is based on the observed problematic in the workplace. You have mentioned being evaluated by a specialist in mental health so we requested a specialist in the same area of expertise to fill out the fitness to work assessment quickly.*
>
> *Here are the 3 choices you have at this moment since your sick leave bank will be used as of next Monday, October 26th, 2020:*
>
> *1. If you choose to meet with the Independent Medical Evaluator (IME), this will solve the sick leave use situation faster.*
>
> *2. Health Canada: A very long process, you could be on sick leave for a long time.*
>
> *3. We wait for your physicians evaluation, you could be on sick leave for a long time.*
>
> *Let me know your choice.*
>
> …
>
> [*Sic* throughout]

[54] The grievor responded that he chose to wait for his physician to complete the FTWE or to have Health Canada conduct it. He stated that his position on this had not changed.

[55] She testified that at all relevant times, the employer was open to receiving the completed FTWE from the grievor's physician. She did not receive any report from the grievor's physician, although one had been promised.

[56] In addition to maintaining his position that he wanted to wait for his own doctor to provide the FTWE evaluation, the grievor accused her of using the health care requirement in bad faith. He also threatened to take various legal actions.

[57] Her direct involvement in the grievor's file ended in December 2020. She testified that the tone in his email communications with her following her request for an update in September 2020 negatively affected her to the point that she felt extremely scared, and she changed her Facebook and social media name. She was scared that he could attack her on social media.

[58] She had no decision-making role as to the grievor's return to the workplace. She played no role in the termination of his employment.

[59] On cross-examination, she explained that she did not look at an earlier FTWE report for the grievor, from April 2019, because she did not want to go over her predecessor's decision.

3. Mr. Charette's evidence

[60] Mr. Charette became the director of the HRS Branch in March 2020. He reported indirectly to the assistant deputy minister through his director general. Mr. Côté reported directly to him. When he arrived, Mr. Côté briefed him on the grievor's file. He took over the file directly in October or November of 2020. He understood that given what had transpired, an FTWE was important for the respondent to ensure that the complainant was able to work and to interact with his workplace colleagues appropriately. The complainant was not allowed to work from home because the respondent's concerns were around interactions through emails. It was important to ensure that workplace exchanges were professional.

[61] Mr. Charette was not involved in the refusal-to-work complaint, as it was made before he arrived.

[62] He believed that the FTWE was important to understanding what was going on with the grievor, given the increasingly aggressive and threatening tone of the grievor's

emails. It was important for the employer to ensure that the grievor was able to work and interact with his workplace colleagues appropriately. Its intent was always to have him return to work.

[63] When it became clear that he would not cooperate with the FTWE process, his leave status was changed from leave with pay to sick leave, starting on October 26, 2020. Once the sick leave credits were exhausted, his status became being on sick leave without pay.

[64] Mr. Charette met with the grievor once, during the facilitated conversation in May 2021, which was held to ensure that the grievor was fully aware of the consequences of his decision as to undergoing the FTWE. A neutral third party was required to facilitate the conversation due to the existing acrimony between the grievor and management. Aside from that conversation, the rest of their communication was done by email.

[65] An FTWE through Health Canada was not available, so the employer retained the Vector Medical Corporation to complete the assessment. This was explained to the grievor in an email dated March 15, 2021, as follows:

> …
>
> *… Health Canada has informed us that they are unable to carry out Fitness to Work Evaluations for the foreseeable future. As such, Health Canada has taken upon themselves to put in place a contract with Vector Medical in order to provide the services that they cannot offer a* [*sic*] *this time. In light of this new information, and in order to have the fitness to work evaluation completed in a timely fashion, we will initiate the required steps to have the assessment completed by Vector Medical. I will inform you once I have more information as to your upcoming appointment.*
>
> …

[66] The grievor responded the same day as follows:

> …
>
> *I believe that you're using this health care requirement in bad faith. I have serious concerns about my privacy rights being breached. Please write to me the consequences that I will face by refusing to go through this assessment with Vector Medical, also in writing to help me understand please tell me why the doctor of my choice [sic] assessment was not acceptable. When you make these clear to me, I will seek legal advice in order to make the right decision.*

…

[67] On March 22, 2021, he emailed the grievor as follows:

…

> *The purpose of this email is to advise you of the next steps in regards to your management instructed absence pending confirmation of your fitness to work.*
>
> *At the outset, I want to acknowledge that you have made it clear on numerous occasions that you disagree with management's actions and have filed several recourses on that matter. That is certainly your right and the appropriate way to address situations where you feel aggrieved.*
>
> *While I respect your rights, this does not release you of your duty to follow by [sic] management's instructions, nor does it allow you to constantly attempt to debate them.*
>
> *As you know, in January 2020, management required that you undergo a fitness to work evaluation (FTWE) in order to confirm whether you were fit to be present in the workplace. You indicated that you had an appointment with your doctor in June 2020 and that the FTWE would then be completed.*
>
> *On June 10, 2020, you advised management that you went to see your doctor to have the FTWE package completed. You confirmed on numerous occasions that Dr. Cooke would fill out the documentation. Unfortunately, more than eight (8) months have since passed and we still have not obtained any medical information on your behalf from the doctor of your choosing, Dr. Cooke, Associate Professor, Psychiatry, University of Toronto. I note that had you chosen to participate in seeking this confirmation, timely and appropriate accommodations could have been put in place to support you, including a possible return to work.*
>
> *Since January 2020, you were provided with one single instruction which was to have a FTWE completed to determine your fitness to work as well as any functional limitations. In response, you have ignored the requests and failed to collaborate. This can no longer continue.*
>
> ***I am hereby formally notifying you that you have until April 6, 2021 to either:***
>
> ***- Provide your consent to undergo a FTWE with Vector by providing the signed form (see attached); or***
>
> ***- Provide the full assessment conducted by Dr. Cooke.***
>
> ***Failure to abide and complete one of the options will leave management with no other choice but to deem your absence as unauthorized. To this end, it should be noted that unauthorized absences may lead to disciplinary and/or administrative measures up to and including termination of employment.***

…

[Emphasis added]

[68] The grievor responded as follows:

> *Please note that I will not be consenting to go through medical assessment with Vector Medical for psychiatric assessment to be done.*
>
> ***I will not be submitting a psychiatric assessment as it is a major invasion of my privacy rights.***
>
> ***Please send me the termination letter by way of email so that I can take the rights to fight this unjust termination speedly*** [*sic*]***.***
>
> *It is a shame that I had to go through reprisal like this for making a health and safety complaint. I also urge you to review the latest case decided by the Federal Court of Appeal with respect to the issues raised on my case* [citation omitted]
>
> …
>
> [Emphasis added]

[69] On March 29, Mr. Charette wrote to the grievor as follows:

> …
>
> *I would first like to confirm that the information requested as part of the fitness to work evaluation would be strictly limited to your functional limitations. As such, rest assured that there would be no breach of your privacy. Last fall, several elements were considered in determining the proper assessment to be completed by a health professional. Indeed, the behavior observed, as well as the specialty of the physician you had chosen to conduct your evaluation in June 2020, helped us identify the type of specialist required. It is this same type of specialist that would be identified for the assessment with Vector Medical.*
>
> …
>
> ***I want to reiterate that management has not, at this point, made the decision to terminate your employment. Similarly, I must also confirm that management has not asked you to resign from your position. Should this however be your decision, I must ensure that you do not feel pressured to resign.***
>
> *Seeing that my concerns regarding your wellbeing* [*sic*] *are still present, I have a responsibility to ensure that you are not making any decision hastily. I highly encourage you to discuss the impacts of your future decisions* [*sic*] *as it relates to your employment with your doctor. I also strongly encourage you to reach out to your bargaining agent or legal counsel and to the Employee Assistance Program at 1-800-*[redacted].

> *The Canada Pension Center* [*sic*] *(CPC) could also provide additional input on the impacts of the end of your employment. The CPC can be reached at 1-800-*[redacted] *from Monday to Friday between 8:00 a.m. to 4:00 p.m.*
>
> ***I want to ensure that you take the time needed to evaluate what the end of your employment would represent for you, prior to you communicating any further decision with me.***
>
> ***In determining how you wish to respond to the current situation and which steps you chose to proceed with, I must ensure that you comprehend the consequences of your decisions. To this end, please note that should you maintain your refusal to either participate in a FTWE or provide Dr. Cooke's evaluation by April 6, 2021, I will have no other option but to recommend that your employment be terminated.***
>
> …
>
> [Emphasis added]

[70] When asked why he was still concerned about the grievor's fitness to work in March 2021, he explained that his concern was based on the grievor's continuous interactions with management and that he believed that something was happening. As a responsible manager, he had to be assured by a health care professional that any past situation had been cleared up. He explained that the grievor exhibited concerning behaviours through multiple emails that were increasingly aggressive.

[71] The health care professional whom the employer chose through Vector Medical specialized in the same medical field as did the grievor's doctor. He believed that the situation was related to mental rather than physical health. The employer sought information to assess whether there was an underlying mental health explanation for the grievor's behaviour and, if so, whether any existing condition affected his ability to work with teammates and clients in a professional setting. Mr. Charette required assurance that the grievor did not pose a psychological or mental health risk in the workplace.

[72] Until the employer received the results of the FTWE, it was unable to consider discipline. It expected that the FTWE's results would clarify whether the grievor's behaviour was culpable or non-culpable.

[73] The grievor responded on April 6, 2021, stating this:

…

> ***Today is April 6, 2021, and I write to you to state unequivocally that I maintain my refusal to go through a psychiatric assessment because it is being requested in bad faith, and is a total breach of my privacy rights.***
>
> *As you recall, In September 2020, you along with Ms. Karyne Paradis tried to force me to see a psychiatrist chosen by the employer, Dr.* [BB]*, and when I refused to go, you placed me on sick leave that I did not file for as a punishment for non-compliance. This forced sick leave that I did not file for is also in the contatary of the collective agreement (please refer to articles 33.05 and 35.06 of PA collective agreement).*
>
> *You stopped my pay on November 30, 2020, and refused to issue a Record of Employment to me for over 3 months in contrary of the Employment Insurance Act. These actions are punishment. And it all began with making a health safety complaint against* [GC] *and an individual who has threatened my life multiple times over, while at work and following me outside of the workplace. You are unfairly trying to paint me more dangerous than him. I stated that I have the right to defend my life against a hateful individual that constantly threatens my life; that does not warrant a psychiatrist assessment. If the colour of my skin and religion makes me "dangerous" for stating that I have the right to defend myself from hateful threatening attacks, then it is obvious how you view me as.*
>
> *You suspended me right after making a complaint under section 128 of the Canada Labour Code, and proceeded with the investigation under section 128 and without my presence total disregard of the law.*
>
> *For all those reasons above, I confirm to you that I will not consent to a psychiatric assessment.*
>
> …
>
> [*Sic* throughout]
>
> [Emphasis added]

[74] Despite the grievor's unequivocal statement that he would not consent to an FTWE through the IME, the employer continued the dialogue by giving him an extension of time to April 30, 2021, to choose one of the options given to him earlier, which were 1) an FTWE through the IME, or 2) provide the report of Dr. Cooke, his personal physician.

[75] In his email dated April 16, 2021, to the grievor, Mr. Charette explained that the FTWE would confirm to the employer whether he was fit to occupy his position, given the behaviours that had raised concerns about his well-being. He also directed the grievor to the facilitated discussion, as follows:

…

> *It has become evident to me that you have lost trust in the Employer and perceive any steps taken as being done in bad faith. Seeing that it is clear that our perceptions of the current situation differ widely and that your decision going forward will have a great impact on your employment, I would like to offer you the opportunity to discuss my motivations for requesting an assessment and the options available to you through a facilitated discussion with a third party. During this discussion, you could be accompanied by a person of your choice, such as your union representative. Hopefully, this would allow us to gain a better understanding of each other's point of view and generate solutions.*
>
> …
>
> *I must remind you that should you maintain your refusal to either participate in a FTWE or to provide the evaluation completed by Dr. Cooke last summer, by April 30, 2021, or refuse to participate in the facilitated discussion, I will have reached the extent to which I am prepared to continue addressing this situation and will have no choice but to proceed to terminate your employment.*
>
> …

[76] Ahead of the facilitated discussion, the grievor made it clear to the employer that he would not consent to an FTWE through the IME. He explained in an email dated May 12, 2021, as follows:

> *… please allow me to say the following so that expectations is clear for the record.*
>
> *Firstly, I am looking forward to the discussion.*
>
> *Our expectations are clear so valuable time will not be wasted. Ms. Lepage made it clear in her email from April 20, 2021 that we are not engaging in a formal meditation and an agreement will not be reached. The purpose of the facilitated conversation is an opportunity for Mr. Charette to verbally restate the same message he was writing to me which is that he is considers me sick and demanding that I go through psychiatric assessment. Mr. Charette emails were clear to me, in case he is not aware of that.*
>
> *Secondly, I've given Mr. Charette and Ms. Paradis my clear reasoning of refusing to his request for me to go through a psychiatric assessment in my April 6, 2021 email. I made my position crystal clear to Mr. Charette and Ms. Paradis that I will not tolerate being prosecuted for my religion. I will absolutely in no circumstances will I agree to his demand and I will repeat this on May 20, 2021 during the facilitated conversation.*
>
> …
>
> [*Sic* throughout]

[77] The parties held the facilitated discussion, as scheduled. In follow-up emails between him and the grievor, they provided their accounts of what transpired during the discussion.

[78] Mr. Charette explained that the employer chose sick leave because the original trigger for the grievor's absence was a suspected mental health situation. He made the decision to move the grievor from paid sick leave to sick leave without pay. It was departmental policy to return departmental equipment once an employee was placed on leave without pay, which explains the request that the grievor return his equipment.

[79] The information sought through the IME was to make sure that the grievor was mentally well to be at work, given the observed behaviour and his continued refusal to cooperate. He was interested in ensuring that if the grievor returned to the workplace, his behaviour would not make the workplace toxic.

[80] He made the decision to terminate the grievor's employment, but the formal delegation of authority was at the assistant deputy minister level, so Ms. Darlene de Gravina signed the letter. He based his decision to terminate the grievor's employment on the grievor's refusal to participate in the return-to-work process and interaction with colleagues through his aggressive email correspondence. The termination letter provided in part as follows:

…

> *On January 7, 2020, you were instructed to remain off work, on leave with pay for other reasons, given the growing concerns management had for your health and safety and that of the overall workplace. This decision was taken as a result of a disturbing and menacing email you sent to another employee in addition to a noted negative change in your behaviour and email exchanges with management. You were advised at the time that you would be required to undergo a FTWE prior to returning to the workplace.*
>
> *On March 3, 2020, you advised that a medical appointment, to complete the FTWE, was scheduled for June 10, 2020.*
>
> *On June 16, 2020, you informed management that you were at the hospital and stated "the blatant racism and threat to my life has taken a toll on me", which further added to management's concerns for your well-being. Similarly, on July 14, 2020, you shared with management that you were currently undergoing a therapy and that a medical specialist was assessing this therapy as*

well as a situation that had recently brought you to the emergency room.

On July 23, 2020, you confirmed that your Doctor had received the FTWE letter prepared by the Employer and that he would be providing a response in the near future, By way of this message, you disclosed that an assessment with your Doctor had occurred via a virtual appointment on June 10, 2020.

On July 31, 2020, you indicated that your Doctor did not want to be bothered by being asked when his evaluation would be completed and that he would do it on his own time. You further mentioned that you started taking medication and that your Doctor was telling you not to rush back to work.

On September 4, 2020, you voluntarily disclosed that you had enrolled in a wellness program. You also indicated that you had not received the completed FTWE from your Doctor but that you would transmit it to management as soon as it was received. In an effort to expedite the process, you indicated that you would be willing to undergo an assessment completed by Health Canada. Management subsequently notified you that the delays associated with this type of assessment were currently very lengthy.

On September 24, 2020, three-months had elapsed since your FTWE was allegedly conducted by your Doctor, which was the intent behind placing you on leave with pay (i.e. to allow you to participate in such an assessment). Seeing that documentation to this effect had yet to be provided, that management's concerns persisted, and that you communicated that you were suffering from health issues, including being hospitalized, it was decided that your leave situation would be changed to sick leave.…

…

On March 22, 2021, a response to your inquiries was provided, at which time management also notified you that your current leave situation could not continue and that a resolution was required. You were therefore instructed to either provide your written consent to undergo a FTWE with Vector Medical or to provide the FTWE completed by your Doctor, by April 6, 2021. You were further informed that failure to abide by these instructions and to select one of the options presented could lead to disciplinary and/or administrative measures up to and including termination of employment. In response, you asked management to send you your terminations letter by email in order for you to be able to contest management's actions.

…

Om May 20, 2021, the facilitated discussion took place at which time management had the opportunity to explain its rationale for requesting a FTWE as well as reiterated that the intended outcome always was, and remains, your reintegration within the workplace. During this discussion, you outlined that you clearly understood the information presented to you but that you continued to be of

> *the opinion that management was not authorized to request that you undergo such an assessment. You further specified that you would not be collaborating by any means, notwithstanding the consequences, which you also confirmed you fully understood.*
>
> *Decision*
>
> *As outlined above, management has taken numerous steps during the last seventeen (17) months in order to support you in completing the required medical evaluation with the hopes that it would confirm your fitness to return to the workplace. Throughout the entire process, the intention has always remained to ensure that you are fit to conduct your duties while also ensuring the health and safety of all employees. Notwithstanding these efforts, you have failed to assuage management's concerns with the troubling and menacing nature of your communications of January 6, 2020 and January 7, 2020, as well as the evident change in your overall behaviour leading up to these communications. You stated that a virtual assessment occurred with your Doctor on June 10, 2020, yet, despite twelve (12) months passing, you have not provided your Doctor's assessment as it relates to either your fitness or inability to return to the workplace.*
>
> *You have made it clear that you do not intend to participate in good faith.*
>
> *This situation cannot be sustained any further. Seeing that the Employer has made great efforts to impress on you the importance of actively participating in the fitness to work process and that you categorically refuse to do so, I am left with no choice but to enforce a resolution to the matter.*
>
> *Therefore, in light of the above and in accordance with Section 12(1)(e) of the* Financial Administration Act, *I hereby terminate your employment with Employment and Social Development Canada effective close of business today.*
>
> …
>
> [*Sic* throughout]

[81] Mr. Charette testified that the grievor was never disciplined because the employer had to satisfy itself of the culpability or non-culpability of his behaviour before imposing any discipline.

B. For the grievor

[82] Mr. Osman testified on his own behalf. He is a Somali-Canadian. He was raised in Kenya and is a practising Muslim. He started working with ESDC in 2009 in its HRS Branch. He moved to its Citizen Services Branch in 2016. He left on sick leave in September or October 2018 and returned in April 2019. He was brought back to the

Human Resources Branch, which is located at 4900 Yonge Street in North York, Ontario, in August 2019.

[83] He met briefly with Mr. Côté, who was responsible for easing him back into the workplace. He testified that between September and October 2019, the employer did not assign him any meaningful work, and he ended up just sitting around. In November 2019, Mr. Côté assigned him to a team leader (anonymized as "VG" in this decision), who also did not give him much to do. VG isolated him from the group and asked him to work with a colleague in British Columbia. All he did was cut and paste and print PDF documents. He was not assigned any meaningful work. He became very frustrated about not having much work to do. He felt that he was being blackballed from doing what he had to do to succeed. All of this negatively affected his mental health and tension was very high for him. I note here that Mr. Osman did not allege in his submissions that the employer's alleged failure to provide meaningful work to him in September and October of 2019 was an act of retaliation covered by the complaint. Instead, I understood his evidence on this issue to be an explanation for why his tension level was high at the time of the alleged incidents with GC in November of 2019.

[84] On November 29, 2019, after he left work, he had an encounter with GC while on the subway going home. GC told him that he was being watched. This statement made him feel very shaken, as he did not know what GC meant by it. He got off at an earlier station. He did not report it, but he discussed it with his mother. A few days later, he had another encounter with GC, who told him that he was being watched and that he was on a watchlist.

[85] He testified that both times, GC told that he was being watched and that he was on a watchlist. According to the complainant, these utterances constituted a dangerous situation for him, as a Black Muslim man residing in Toronto. He believed that GC had labelled him as someone who was closed-minded and not open to the lifestyle of Canadian values. After the second incident, he reported the occurrence to the police service, which suggested that he report it to his employer.

[86] On December 22, 2019, he informed the respondent that he was exercising his right under s. 128 of the *Code* to refuse what he considered a workplace danger by being exposed to GC. He was repeatedly exposed to GC in the workplace, and GC

threatened him in the public space adjacent to the office and in the transit station underneath the office building. These interactions occurred on November 29, 2019, and during his lunch break on December 20, 2019.

[87] On December 23, 2019, the respondent acknowledged its receipt of the refusal-to-work complaint and instructed the grievor to work from home in the interim, pending the investigation. This was not convenient because he did not have the necessary tools to carry out his duties; for instance, he did not have a printer at home. It was very stressful because he did not have any meaningful work, and for the duties that he was assigned, he did not have the tools to carry them out. According to him, "the tension was quite high".

[88] In that context, he sent the Watch List email on January 7, 2020. He testified that he did so because he felt that GC's behaviour toward him was cowardly, and he was at a breaking point, since he did not seem to be receiving help from anywhere.

[89] According to him, management took the Watch List email, misinterpreted it, and used it against him, because on that very same day, he received the FTWE suspension email from Mr. Côté.

[90] He felt that the suspension was unfair because Mr. Côté did not give him an opportunity to explain himself. He was being treated unfairly in the workplace, and the employer asked him to undergo yet another FTWE (he had been cleared to work in April 2019). To him, writing the Watch List email was the most reasonable thing to do given his circumstances, and he wanted GC to leave him alone. He emailed repeatedly because he felt that he was not being heard. He had been suspended, and the investigation of his refusal-to-work complaint was on hold. The employer was simply not considering his situation.

[91] He made his first complaint on January 8, 2020, after he received Mr. Côté's FTWE suspension email.

[92] He asked about going on leave without pay in January 2020 because he wanted to leave altogether and to go on extended leave, so that he could reflect on many things. He would have rather not worked from home, as doing so was impossible for him.

[93] Mr. Côté wrote to him on January 24, 2020, asking him to respond to three questions related to the refusal to work complaint. Since he was suspended from the workplace, he refused to take part in the investigation. Under the *Code*, he had to be present for the investigation. He emailed the following to Mr. Côté:

> …
>
> *With respect, and I must repeat myself. I request that this investigation to* [*sic*] *be conducted in my presence as the Code mandates, and not while I am dismissed and not allowed to be present at my workplace and where the December 20th incident occurred.* ***The incidents occurred both inside and outside of the workplace****. You're unfair and already alleged that I am the "dangerous" one.*
>
> *You're disadavtanging* [*sic*] *me by trying to conduct this investigation without my presence when I requested to participate in the investigation in person.*
>
> [Emphasis in the original]

[94] The investigation of the refusal-to-work complaint concluded in May 2020. The employer found that there was no danger.

[95] In February 2020, he received a package in the mail, and he noticed that the seal was broken. He assumed that the employer had sent him registered mail. He was very upset that the seal was broken. It was reckless on the employer's part because the package contained his personal information related to the FTWE. He immediately contacted Mr. Côté about that breach of privacy, and he made a complaint under the *Privacy Act* (R.S.C., 1985, c. P-21).

[96] He had an appointment with his doctor on June 10, 2020, and another follow-up appointment in July. He had every intention of forwarding the medical assessment to the employer, as requested. He became concerned about the questions that the employer asked of the doctor, particularly question 5, which states: "Does Mr. Osman represent a danger to himself and/or to others in the workplace? To this end, and based on his email of January 7, 2020, is there reason to believe that he could present a danger specifically to [GC]?"

[97] At the July follow-up meeting, his doctor advised him to speak with his union representative about the employer's request, which he did.

[98] In a conversation with Ms. Paradis in the summer of 2020, he informed her that he was unsure when his doctor's report would be ready. He did not feel that the process was fair to him. He felt that the employer pressured him unreasonably. He did not know why it placed him on sick leave and then pressured him for an FTWE. It made the suggestion that he had a condition that prevented him from doing his work.

[99] In response to placing him on sick leave in October 2020, he filed a grievance, alleging that he had suffered disguised discipline and defamation. When his sick leave credits ran out on December 1, 2020, he applied for Employment Insurance benefits. He was not entitled to sick benefits under the Employment Insurance scheme because he was not sick. He was eligible only for regular benefits. The employer did not submit a record of employment for him until April 2021. He received regular Employment Insurance benefits until May 2021.

[100] By March 2021, it became apparent to him that the employer's actions were unfair. His main concern was the fact that he had previously cooperated with a medical assessment that it requested, yet it ignored that assessment's recommendations. The April 10, 2019, assessment provided in part as follows:

…

> *2.1 Mr. Osman is able to work in a team environment, except for the accommodation that he would require a permanent move to a new branch because a [sic] significant past concerns and negative experiences in his previous assignment*
>
> *2.2 Mr. Osman is able to work in an external client service environment with minor accommodation. He might experience significant distress working with clients who have lost or been unable to sustain employment due to significant workplace conflict and/or harassment, due to reminders of his own concerns.…*

…

[101] The reason he took the position that he would no longer comply with the FTWE was that the questions that the employer asked were covered by the one from April 2019, which it had ignored.

[102] On March 19, 2021, he emailed the employer, as follows:

…

> *As I previously stated I have very serious privacy concerns. In January 2020, Mr. Charles Cote placed my health records in the mail and it came to me in an open package, my health records that entrusted this departement to safeguard were breached. I filed a complaint about that with the Privacy Commission.*
>
> *I want to remind you what the Courts says about requesting medical examination "The need for a medical examination is described as* ***"drastic action"*** *which must have a "substantial basis" and will only be required in* ***"rare cases"*** *Mr. Justice Shore in Canada (Attorney General) v. Grover, 2007 FC 28*
>
> *In less than a year management requested that I go through 2 medical examinations. I cooperated and submitted Dr. Cooke's assessment in April 2019, you admitted that management accepted this with no issue. Upon my return to the workplace, I was the victim of workplace violence. I made a workplace health and safety complaint. Then in January 2020, after I filed a refusal to work complaint under Canada Labour Code which management accepted, they forced me out and ordered me to go through yet another medical examination,* ***these requests are made frequently, not rare****. Do you expect me to submit a new medical examination twice year?*
>
> *The work refusal complaint under section 128 was investigated without my presence, and I appealed to Canada Industrial Relations Board unders section 129(7) of the code.*
>
> *At the moment I am waiting for the hearing to my appeal with the Canada Industrial Relations Board. Punishing me before the Canada Industrial Relations Board hears my appeal serves management, this will enable management to argue the issue before the Board is "moot", otherwise you would be willing to wait until Canada Industrial Relations Board hears the workplace violence complaint, and not try to circumvent that process.*
>
> *I do not understand your request. I am seeking legal advice about this matter, please kindly write to me in detail the following:*
>
> ***1.*** *Consequences that I will face by refusing this assessment with Vector Medical due to concerns for my privacy*
>
> ***2.*** *Why is psychiatric assessment necessary?*
>
> ***3.*** *Please provide me with the sub-contract agreement that I was not a party to between Health Canada and Vector Medical involving me.*
>
> …
>
> [*Sic* throughout]
>
> [Emphasis in the original]

[103] On March 22, 2021, the employer responded by outlining two options for him: 1) consent to undergo the FTWE through the IMEB; or 2) provide the full assessment

completed by his own physician. The employer asked him to respond by April 6, 2021, and that failure to select an opinion by the deadline would result in his absence being deemed unauthorized with potential disciplinary and administrative measures up to and including termination of employment.

[104] The grievor responded the same date that he would not be consenting to go through a medical assessment, nor would he be submitting to a psychiatric assessment as it was a major invasion of his privacy. He then asked the employer to send him the termination letter by way of email so he could take the appropriate recourse speedily.

[105] The grievor testified that he did not believe that the tone of his communication with management was aggressive. He felt that it targeted him, which made him very vulnerable.

[106] He provided details of the steps that he took to mitigate his losses after his employment was terminated. His sole sources of income were Employment Insurance benefits and his family. He has not been employed since his employment was terminated. He also relied upon his savings. He used the website LinkedIn and different organizations to look for jobs. He searched for jobs related to labour relations, human resources, and organizing and developing workplace investigations.

[107] On cross-examination, he described the steps that he took to search for a job.

[108] As for his interactions with the employer during the relevant period, he confirmed that with the exception of one telephone call in early 2020, all his communications with Mr. Côté were done by email. He never met Ms. Paradis in person, although one meeting was considered. His communication with her was mostly done by email, except for one telephone conversation, on July 31, 2020. He had the in-person facilitated discussion with Mr. Charette, in addition to email communications.

[109] He explained that when he stated “by all means” in the December 21, 2019, email, he meant taking recourses. He did not intend any physical violence. He disagreed with counsel for the employer’s suggestion that his emails were threatening.

[110] He stated that he has never been physically violent.

[111] Counsel for the employer suggested that GC’s comments were not threatening. He disagreed and explained that telling a Black Muslim man that he is on a watchlist

implies that he is a terrorist. In his experience, anti-Muslim hatred is real and rampant and could degenerate into physical assaults. He also stated that in addition to the comments, GC made a vulgar sexual gesture that was offensive to him as a Muslim. When pushed on why the alleged sexual gesture was not documented anywhere in his emails, he explained that he felt embarrassed as a Muslim to repeat it in an email.

[112] When asked if calling someone a bigot is inappropriate, he replied that it depended on the context.

[113] It was suggested to him that he called Mr. Charette a racist more than once. He explained that he had been facing racism in the workplace. He believed that the request for an FTWE had racist undertones. He complained that repeated exposure to GC in the workplace posed a danger to him. The employer turned it around and suggested that he was a danger to GC. In that context, he made the comment about blatant racism. He felt that the employer was being racist and Islamophobic.

[114] By email dated June 4, 2020, he shared the following with Mr. Côté:

> …
>
> *I would like to discuss/share the anti-black and Islamophobia that I have experienced at my workplace through a blog, and with a support group of other black Canadians that had similar experiences. Sharing our experiences allow us to heal, especially when my none-black* [*sic*] *colleagues all refused to speak-up.*
>
> *I would like to share my own personal experiences and not how it felt not being supported by colleagues that witnessed the hate against [sic].*
>
> *I hope that this is acceptable if not then let me know.*
>
> …

[115] He explained that the comments in his email correspondence to Mr. Charette and Mr. Côté about racism and Islamophobia were based on his lived experiences, as he believed that he had faced hatred in the workplace.

[116] He was questioned about the facilitated discussion with Mr. Charette and his assertion that he felt coerced and that he had no choice but to attend. It was suggested to him that he participated in it voluntarily. To support this line of cross-examination, which dealt with the grievor's credibility, counsel for the employer referred to two emails — the invitation to the discussion and the grievor's acceptance of it. The

invitation was contained in Mr. Charette's email dated April 16, 2021, in which he encouraged the grievor to reconsider his position and to reach out to his bargaining agent for guidance regarding the facilitated discussion. In the same email, he also informed the grievor that if he refused to participate in the FTWE, provide the evaluation completed by his doctor or to participate in facilitated discussion, he would have no choice but to proceed with termination of his employment.

[117] On April 16, 2021, Mr. Charette emailed as follows:

> …
>
> *I have carefully read your response. I have taken note of your views and acknowledge that you do not wish to collaborate with the Employer as it pertains to undergoing a fitness to work evaluation. This step would allow management to confirm whether you are fit to occupy your duties further to the behaviours that raised concerns for your well-being and allow for a return to work should you be deemed fit.*
>
> *It has become evident to me that you have lost trust in the Employer and perceive any steps taken as being done in bad faith. Seeing that it is clear that our perceptions of the current situation differ widely and that your decision going forward will have a great impact on your employment, I would like to offer you the opportunity to discuss my motivations for requesting an assessment and the options available to you through a facilitated discussion with a third party. During this discussion, you could be accompanied by a person of your choice, such as your union representative. Hopefully, this would allow us to gain a better understanding of each other's point of view and generate solutions.*
>
> …
>
> *Notwithstanding your position in the April 6, 2021 email, I would again encourage you to reach out to your bargaining agent in order to ensure that you fully understand the impact of your decision an [sic] consider the facilitated conversation as an effort to attempt to reach an understanding as to our current position. To this end, please take this time to seek guidance and notify me* ***by Friday April 30, 2021*** *should you wish to revisit your decision and utilize the opportunity of a facilitated discussion.*
>
> *I must remind you that should you maintain your refusal to either participate in a FTWE or to provide the evaluation completed by Dr. Cooke last summer, by April 30, 2021, or refuse to participate in the facilitated discussion, I will have reached the extent to which I am prepared to continue addressing this situation and will have no choice but to proceed to terminate your employment.*
>
> …

[Emphasis in the original]

[118] The grievor responded on April 17, 2021, as follows:

> …
>
> *On April 16, 2021 you requested that we have facilitated talks with a third party and I agreed. I contacted my union to join us, I hope that they will.*
>
> *It is my hope that this will give me an opportunity to discuss why your request for psychiatric assessment is in violation of my privacy rights and why I consider it to be in bad faith.*
>
> *I am cooperating with any request that gives me the opportunity to address my concerns.*
>
> *I hope that we can have this facilitated talks [sic] as soon as possible.*
>
> …

[119] When asked how his response to the invitation coincided with his statement that he felt forced to attend the meeting, the grievor stated that Mr. Charette threatened him with termination, so he wanted to cooperate; he felt that he had no other choice but to cooperate. He disagreed with counsel for the employer's suggestion that the email was about the FTWE.

[120] He was asked to explain his end game as of April 2021, given his stance on the FTWE. He stated that he wanted to return to work safely. He believed that the employer did not try to understand his concerns about his workplace safety and that it failed to address the root cause of the problem. He felt that it used the process in bad faith and that it failed to address his safety concerns. He wanted to return to work without a medical assessment.

[121] It was suggested to the grievor that he had ongoing mental health issues that might have flared up when he wrote some of the emails that management found concerning. He denied that suggestion.

[122] Counsel for the employer then took him to emails in which he shared information about his mental health issues with the employer. On June 16, 2020, he wrote to Mr. Côté that he was in hospital because the "blatant racism and threat" to his life had taken a toll on him. Then on July 14, 2020, he informed Ms. Paradis that he was currently going through therapy and that his specialist was reviewing that and the

situation that had led him recently to the hospital emergency department. He had also informed Ms. Paradis that his specialist, Dr. Cooke, who is a staff psychiatrist at the Centre for Addiction and Mental Health in Toronto and an associate professor of psychiatry at the University of Toronto, had advised him not to rush back to work.

[123] Counsel for the employer suggested to him that the health care professional whom the employer selected was in the same field of practice as his specialist; therefore, he had no basis to object. He explained that he did not trust the objectivity and independence of a health care professional whom the employer chose.

IV. Summary of the arguments

[124] At the conclusion of the evidentiary portion of the hearing, I heard the employer's submissions, and I allowed the complainant to prepare his submissions in writing. I scheduled a half-day hearing to receive his submissions and the respondent's reply.

A. For the employer and respondent

[125] In addition to its oral submissions, the employer filed a 3-volume book of authorities containing 37 cases which have been listed in Appendix A. I have read all the cases; however, I will refer only to those I find of primary significance to my analysis.

[126] The employer argued that it had reasonable and probable grounds to request an FTWE from the grievor when it initially made its request on January 21, 2020, and that it continued to have reasonable and probable grounds until June 9, 2021, when it terminated his employment.

[127] The grievor's suspension from the workplace was administrative and not disciplinary. If it is found disciplinary, then the Board must find that the disciplinary suspension was warranted. Similarly, if the termination is found disciplinary, it was still warranted. The employer properly dismissed him for failing to comply with the FTWE. The termination letter sets out its position as to the facts, and its narration of those facts is more credible than his version.

[128] There was no disguised discipline with respect to either the suspension or the termination. The evidence sets out that the employer made considerable efforts to gather relevant information from the moment it had concerns about the grievor's

health and his capacity to remain in the workplace safely. The fact that the employer paid him for nine months pending the receipt of the requested information is evidence of good faith and a genuine concern for him.

[129] The employer did not possess the medical expertise to assess the grievor's fitness to work. Consistent with respecting his privacy, it requested the information from his treating physician and then moved to a third-party physician only when it became evident that the information would not be forthcoming from his physician.

[130] With respect to the first reprisal complaint, the respondent took no action against the complainant that would fall within the prohibitions outlined in s. 147 of the *Code*; therefore, the complaint must be dismissed. The second complaint is untimely and must be dismissed on that basis. There is no basis to uphold the complaints, as there was no discipline.

[131] With respect to credibility, the employer argued that the grievor is not a credible narrator of facts; therefore, the evidence of its witnesses must be preferred over his version. Its counsel specifically urged the Board to make a finding of unreliability against him because there were so many inconsistencies in his narration of the facts and events. For example, Ms. Paradis' recollection of her brief telephone discussion with him on July 31, 2020, was consistent with the contemporaneous email that she sent to the labour relations advisor. She testified that the summary of the conversation in the email was accurate. On the other hand, he was selective when he related the facts of their telephone discussion.

[132] Counsel for the employer also cited the grievor's narration of the two incidents in which he alleged that GC threatened him and allegedly made a sexual gesture. His explanation that he did not disclose the sexual gesture at the time because he felt embarrassed is indicative of an unreliable narrator of facts. If the event occurred as he asserted it did, he would have documented it in his emails.

[133] With respect to the impact of the allegations of racism and Islamophobia and the grievor's lived experience as a Black Muslim man, the employer took the position that irrespective of the incident, his response to it was sufficient to raise a duty to inquire on its part. That duty was heightened by his inappropriate email communications that continued to be increasingly aggressive in tone and threatening to the recipients.

[134] The employer could have disciplined the grievor for the content of those emails, and if it did discipline him, the termination of his employment would have been warranted. Instead, it took the appropriate non-disciplinary approach by requesting an FTWE.

[135] With respect to the suspension, counsel for the employer referred to the Federal Court of Appeal's *Bergey* case to outline the analytical framework. *Bergey* upheld *Grover* and other cases that have stated that the Board has jurisdiction to review suspensions and terminations for disguised disciplinary reasons (see paragraph 36). The Board must consider the employer's actual intent, the purposes behind taking the action that it took, and that action's impact on the employee.

[136] In this case, there was no doubt that the grievor's behaviour was inappropriate. Therefore, the Board must determine whether the employer's true intent in suspending him from the workplace was to punish or correct his behaviour or to ensure workplace health and safety. The employer argued that its intent was to ensure workplace health and safety and that it was not disciplinary. It further points to the fact that the grievor received no punitive impact since he was put on leave with pay for nine months. The impact on him was minimal.

[137] On the issue of provocation as a mitigating factor, counsel for the employer argued that even were one to accept that GC's alleged actions constituted provocation, it still would not justify the grievor's subsequent behaviour in his increasingly threatening and aggressive email communications (see *A&P*, at paras. 25 and 26).

[138] The facts in this case are closely akin to those in *Theaker*, in which a stormy workplace relationship led to inappropriate emails. As in *Theaker*, not every financial repercussion is a financial penalty (at paragraph 12). What occurred in this case was a financial repercussion of not cooperating with the employer in seeking an FTWE. It was not a penalty. The employer made extensive attempts to permit the grievor to return to the workplace. Its intention was to obtain information about his fitness for duty; it was not disciplinary.

[139] The employer explained to the grievor why it required the FTWE information, and it gave him every opportunity to obtain it. By March 2021, it was clear that he would not provide any medical information to it.

[140] Counsel for the employer argued that workplace threats are very serious and even more so when they are repeated and involve multiple people and there are no details about how the threats would be carried out. In such circumstances, the employer is obligated under s. 124 of the *Code* to take steps to mitigate the workplace risks. Employers are becoming less and less tolerant of psychological and physical threats in the workplace. In this case, the employer was more concerned about the potential risk to the workplace rather than the grievor's moral culpability. Its witnesses testified that they found his email communications threatening.

[141] Although the grievor testified that he did not allude to physical violence in the Watch List email, the employer's interpretation of it and other emails was reasonable in the context of the surrounding circumstances. He testified that he was frustrated at work, upset, and in an agitated state. The employer could not predict his actions, despite the absence of a history of physical violence in the workplace. Relying on the *Greater Vancouver* case, the employer argued that threats of violence in the workplace constitute serious misconduct that it must take seriously. There should be no room in the workplace for conduct that causes fear in others (see *Greater Vancouver*, at para. 31).

[142] In *Johnson Controls*, the arbitrator found that there were insufficient mitigation factors and that one must consider the impact on the person receiving the threat. There is heightened concern that employers must take these incidents seriously, given the unpredictability of human behaviour.

[143] What constituted threatening behaviour in this case was the aggressiveness in the grievor's tone and his repetitive emails. The employer did not do what he wanted; therefore, he became more and more frustrated and aggressive. (see *McCain*, at paras. 124 and 140).

[144] While questioning an employee's health condition may seem intrusive and perhaps even galling to the employee, it is a legitimate management function to update and assess workplace disability cases (see *Vancouver (City)*, at paras. 19, 21, and 23). The employer has a right and duty to demand an FTWE if there are reasonable and probable grounds for one. In the context of threats and aggressive behaviour, the employer may not be able to predict the employee's behaviour, as there are many questions to consider, such as, whether the employee is a danger to himself or herself,

whether the employee poses a risk to others in the workplace, whether the employee poses a risk to property, and whether the employee is fit to perform their work duties.

[145] Employees are responsible for cooperating with their employers, to ensure workplace health and safety. It is evident that the grievor failed to cooperate with the employer. Counsel for the employer referred to *Baun*, in which the employer requested an FTWE because it observed that the employee was experiencing distress.

[146] With respect to the reprisal complaints, counsel for the employer referred to *Hood* and argued that under circumstances like those in this case, the Board found that the grievor's suspension pending a medical assessment was administrative and not disciplinary in nature.

[147] The respondent argued that the second complaint was untimely and that it must be dismissed on that basis, given that the Board lacks the jurisdiction to extend the time limits.

[148] With respect to remedy, the employer argued that the grievor's mitigation evidence did not meet the mitigation yardstick. He started looking for jobs only in December 2021. A job search is not simply a matter of the number of applications made; he had to make reasonable efforts. Sending four applications during the entire period did not suffice. His efforts were not reasonable.

B. For the grievor and complainant

[149] The grievor's written argument and book of authorities are retained on file. The cases he referred to are listed in Appendix A. He also referred to the following materials: Akwasi Owusu-Bempah, "Black Males' Perceptions of and Experiences with the Police in Toronto" 2014: Doctoral thesis, University of Toronto, Ontario Human Rights Commission, *Policy on preventing discrimination based on creed*, (2015), and a CBC News article posted on August 19, 2020, and entitled, "Muslim group calls for 'serious action' after Toronto mosque vandalized for 6th time since June".

[150] On the termination grievance, the grievor argued that the Board has jurisdiction and that through s. 226 of the *Act*, it has the authority to interpret and apply the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6). He relied on *Chamberlain* for this argument.

[151] The employer referred to numerous cases relating to disciplinary terminations resulting from very serious and apparent workplace violence situations that included uttering death threats, physical violence, threatening to shoot, and bomb threats, but none of those apply to this situation. It terminated the grievor's employment because he refused to undergo an FTWE. It did not give him the opportunity to defend himself through the disciplinary process, during which he could have explained what he meant by the Watch List email.

[152] The employer invited the Board to accept the ruling in *Burke 2014*; however, in *Burke 2019*, the Board ruled that the issue of refusing to undergo an FTWE was not settled in *Burke 2014*. The proper test to assess whether an employer has reasonable and probable grounds to request an FTWE is set out in *Burke 2019*.

[153] The employer did not meet the test for reasonable and probable grounds when it kept him out of the workplace on January 7, 2020, and throughout his suspension until it terminated his employment on June 9, 2021. Its witnesses testified that they suspected that he had "mental health issues". Simply because the employer suspected that he was unwell did not meet the test for probable grounds.

[154] The contents of his emails did not constitute workplace violence. The emails were meant to state that he would take the necessary steps to protect himself legally, and it was never his intention to be physical or violent with anyone.

[155] The employer did not consider that the COVID-19 pandemic situation had made virtual and hybrid work a necessary option for most employees, yet he was not given the option to work remotely.

[156] On the alleged events that led to the refusal-to-work complaint, he invited the Board to draw an adverse inference from the employer's failure to call GC to testify.

[157] The grievor made submissions on the issue of discrimination based on race and creed and his lived experience as a Black Muslim man. The essence of his argument in this respect was that there was implicit bias in how the employer addressed his concerns about the interactions with GC. It did not consider how GC's utterances and gestures impacted him as a Black Muslim man. Rather, it was quick to address his reaction (the Watch List email) to the treatment that he received from GC. It did not address the root cause of the workplace problem that he was experiencing.

[158] GC's remarks were psychologically damaging, provocative, and threatening to him. Remarks like being on a watchlist presupposed that he was a criminal and a terrorist. He is not a violent person; he does not have a criminal record and has never been charged with anything of that sort.

[159] Ms. Paradis testified that she feared what he could do, which made her change her social media accounts. He testified that he was not in any way a danger to her and that the thought of looking into Ms. Paradis' social media presence never occurred to him whatsoever. Therefore, her avowed fear of him was irrational.

[160] Mr. Côté never asked him about what he meant by the wording in the Watch List email before suspending him and requesting an FTWE on the same day, yet he acknowledged in cross-examination that it could have meant "a lot of stuff" and that it was subject to interpretation.

[161] The grievor argued that the employer's actions against him were influenced by the negative stereotypes about Muslims and Black men that allege that they are prone to violent behaviour and to threatening others. Those negative stereotypes influenced the employer to request an FTWE on "mental health issues".

[162] On the issue of disguised discipline, the grievor argued that the employer tried to correct his behaviour and to have him to comply with the FTWE when it forced him to take sick leave with pay on October 26, 2020. He did not meet its deadline of September 24, 2020, to submit his doctor's report; nor did he see the psychiatrist that the employer had handpicked. He suffered a financial penalty by being forced to exhaust his sick leave credits. He relied on the *Massip* case for this argument.

[163] He was not sick; therefore, forcing him to take sick leave was improper.

[164] The employer's witnesses testified that they had no medical information to support their supposition that he suffered from any medical condition. Its decision was significantly disproportionate to the stated administrative rationale and must therefore be considered disciplinary (see *Frazee*, at para. 25).

[165] For the reprisal complaints, the complainant argued that the respondent accepted his refusal-to-work complaint and that it carried out an investigation without his presence, contrary to the *Code*'s requirements. The work-refusal process cannot occur if the employee is not at work.

[166] The complainant argued that "[a]n employer may take disciplinary action for a good reason, a debatable reason or for no reason at all, as long as …" the *Code* is not violated (see *Ouimet*, at para. 56).

[167] He argued that the respondent violated the requirements of the *Code* and that there was an essential nexus between his *Code* rights and the respondent's decision to suspend him from the workplace.

C. Reply

[168] The employer replied orally to the grievor's written argument. The reply addressed most of the arguments already made, so I need not repeat them.

[169] With respect to *Burke 2019*, the employer argued that it had reasonable and probable grounds to request the FTWE based on the grievor's behaviour and its concerns about his overall health and well-being. His behaviour triggered a duty to inquire on its part. It relied on *Campbell*, at para. 61, *Blackburn*, at para. 106, and *Grover*, at para. 65.

[170] The employer could not be expected to continue paying the grievor indefinitely.

V. Reasons

A. Statutory framework — complaints under the *Code*

[171] The provisions of Part II of the *Code* are important and relate to occupational health and safety in the workplace. There are provisions on employer and employee obligations and on the establishment and functioning of workplace committees to address health-and-safety issues, recourses, and sanctions for violations.

[172] One of the important employee protections in Part II is the freedom from reprisals for exercising any right under that part. It is codified in s. 147 as follows:

147 *No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part,*	***147*** *Il est interdit à l'employeur de congédier, suspendre, mettre à pied ou rétrograder un employé ou de lui imposer une sanction pécuniaire ou autre ou de refuser de lui verser la rémunération afférente à la période au cours de laquelle il aurait travaillé s'il ne s'était pas prévalu des droits prévus par la*

have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee	*présente partie, ou de prendre — ou menacer de prendre — des mesures disciplinaires contre lui parce que :*
***(a)** has testified or is about to testify in a proceeding taken or an inquiry held under this Part;*	***a)** soit il a témoigné — ou est sur le point de le faire — dans une poursuite intentée ou une enquête tenue sous le régime de la présente partie;*
***(b)** has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or*	***b)** soit il a fourni à une personne agissant dans l'exercice de fonctions attribuées par la présente partie un renseignement relatif aux conditions de travail touchant sa santé ou sa sécurité ou celles de ses compagnons de travail;*
(c) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.	***c) soit il a observé les dispositions de la présente partie ou cherché à les faire appliquer.***

[Emphasis added]

[173] An employee who believes that their employer has violated s. 147 has the right to make a complaint under s. 133, as follows:

***133 (1)** An employee, or a person designated by the employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.*	***133 (1)** L'employé — ou la personne qu'il désigne à cette fin — peut, sous réserve du paragraphe (3), présenter une plainte écrite au Conseil au motif que son employeur a pris, à son endroit, des mesures contraires à l'article 147.*
***(2)** The complaint shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.*	***(2)** La plainte est adressée au Conseil dans les quatre-vingt-dix jours suivant la date où le plaignant a eu connaissance — ou, selon le Conseil, aurait dû avoir connaissance — de l'acte ou des circonstances y ayant donné lieu.*
***(3)** A complaint in respect of the exercise of a right under section 128 or 129 may not be made unless*	***(3)** Dans les cas où la plainte découle de l'exercice par l'employé des droits prévus aux articles 128*

the employee has complied with subsection 128(6) or the Head has received the reports referred to in subsection 128(16), as the case may be, in relation to the matter that is the subject-matter of the complaint.	*ou 129, sa présentation est subordonnée, selon le cas, à l'observation du paragraphe 128(6) par l'employé ou à la réception par le chef des rapports visés au paragraphe 128(16).*
(4) *Notwithstanding any law or agreement to the contrary, a complaint made under this section may not be referred by an employee to arbitration or adjudication.*	***(4)*** *Malgré toute règle de droit ou toute convention à l'effet contraire, l'employé ne peut déférer sa plainte à l'arbitrage.*
(5) *On receipt of a complaint made under this section, the Board may assist the parties to the complaint to settle the complaint and shall, if it decides not to so assist the parties or the complaint is not settled within a period considered by the Board to be reasonable in the circumstances, hear and determine the complaint.*	***(5)*** *Sur réception de la plainte, le Conseil peut aider les parties à régler le point en litige; s'il décide de ne pas le faire ou si les parties ne sont pas parvenues à régler l'affaire dans le délai qu'il juge raisonnable dans les circonstances, il l'instruit lui-même.*
(6) *A complaint made under this section in respect of the exercise of a right under section 128 or 129 is itself evidence that the contravention actually occurred and, if a party to the complaint proceedings alleges that the contravention did not occur, the burden of proof is on that party.*	***(6)*** *Dans les cas où la plainte découle de l'exercice par l'employé des droits prévus aux articles 128 ou 129, sa seule présentation constitue une preuve de la contravention; il incombe dès lors à la partie qui nie celle-ci de prouver le contraire.*

[174] The CIRB is the main statutory body responsible for dealing with the recourses set out under Parts I and II of the *Code*. However, Parliament carved a specific role for the Board and its predecessors to adjudicate complaints made under s. 133 with respect to the public service and persons employed in it (see s. 240 of the *Act*). These are allegations of retaliatory acts taken by an employer against an employee for exercising rights or seeking the enforcement of rights under Part II of the *Code*.

[175] The prohibitions and recourses set out in ss. 133 and 147 of the *Code* provide a protective scheme that seeks to promote workplace health and safety and to provide recourse to employees who choose to exercise their rights or engage processes under Part II of the *Code*.

[176] Subject to s. 133(6), which reverses the burden of proof, a complainant must establish that on a balance of probabilities, the respondent breached s. 147 of the *Code* by engaging in prohibited conduct.

[177] I conclude that the reverse onus applies to the first reprisal complaint.

[178] The Board's role is not to determine whether the complainant faced a workplace danger; its role is to determine whether the respondent took reprisal action against him because he exercised a right or sought the enforcement of a right under Part II of the *Code*.

[179] The respondent referred to and relied on the test outlined in the *Vallée* case. In 2022, the Board reformulated and simplified the principles in *Vallée* in the two companion cases of *White v. Treasury Board (Correctional Service of Canada)*, 2022 FPSLREB 52, and *Burlacu v. Treasury Board (Canada Border Services Agency)*, 2022 FPSLREB 51 (together, "*White/Burlacu*").

[180] I adopt the applicable legal test that the Board set out in *White/Burlacu* as follows [from paragraph 96 of *Burlacu*]:

> …
>
> *[96] Having considered the parties' arguments, the wording of s. 147 of the Code, and the case law, I find it more useful to reformulate and simplify the principles in Vallée as follows:*
>
> *1. Has the complainant acted in accordance with Part II of the* Code *or sought the enforcement of any of the provisions of that Part (section 147)?*
>
> *2. Has the respondent taken against the complainant an action prohibited by section 147 of the* Code *(sections 133 and 147)? and*
>
> *3. Is there a direct link between (a) the action taken against the complainant and (b) the complainant acting in accordance with Part II of the* Code *or seeking the enforcement of any of the provisions of that Part?*
>
> …

1. The first reprisal complaint — Board file no. 560-02-41418

[181] The complaint in Board file no. 560-02-41418 was made on January 8, 2020. The complainant received an email on January 7, 2020, from Mr. Côté informing him of these four things:

> 1) the complainant would be subjected to a disciplinary hearing at a future date for inappropriate and threatening communications;
> 2) he would be required to undergo an FTWE;
> 3) he was being placed on leave with pay pending the FTWE, and he was not to report to work or communicate with anyone at the workplace, except Mr. Côté; and
> 4) the investigation of his work refusal would be put on hold until further notice.

[182] On December 21, 2019, the complainant had informed the respondent that his safety inside and outside the workplace was being compromised by a specific employee of the respondent. He stated that he was "… close to a point where [he would] defend [himself] by all means."

[183] On December 22, 2019, he informed it that he was exercising his right under s. 128 of the *Code* to refuse to work because of what he perceived to be dangerous working conditions, namely, repeated exposure to the specific employee (GC) in the workplace.

[184] The respondent acknowledged the refusal-to-work complaint on December 23, 2019, and informed him that it would meet with him to discuss and investigate it. In the interim, the respondent directed him to work from home until further notice, since he had a laptop and remote access.

[185] On January 7, 2020, the complainant sent the Watch List email to GC and copied Mr. Côté and other managers. In response, the respondent sent the FTWE suspension email.

[186] Under s. 133(6) of the *Code*, the respondent bears the burden of proving that a violation of s. 147 has not occurred when the complainant has exercised a right to refuse work under s. 128. To do so, the respondent must demonstrate that the action that it took was not of the nature of the actions proscribed by s. 147 or that there is no direct link between its action and the exercise of the complainant's right under s. 128.

[187] The actions or inactions prohibited under s. 147 are dismissal, suspension, financial penalty, non-remuneration, disciplinary action, or threat of disciplinary action.

[188] On January 7, 2020, the respondent informed that complainant that the Watch List email that he sent to GC was threatening in tone and was inappropriate. Therefore, it would organize a disciplinary hearing at a later date to address his behaviour.

[189] In that same email, the respondent informed the complainant that before it would hold the disciplinary hearing, it had to ensure the health and safety of the work environment, as it had significant concerns with his "… overall well-being and current state of mind." Consequently, it placed him on leave with pay until a medical professional assessed him.

[190] The respondent removed the complainant's systems and building access until further notice and instructed him not to report to work and not to communicate with anyone at ESDC, except Mr. Côté.

[191] The respondent informed the complainant that the investigation into his work refusal and a scheduled interview would be put on hold.

[192] I must examine the respondent's actions between December 22, 2019, and January 7, 2020. I must review the five discrete actions that it took during that period, to assess whether they constituted actions proscribed by s. 147. The actions were set out in two emails, dated December 23, 2019, and January 7, 2020, respectively, and are as follows:

> 1) in the December 23, 2019, email, instructing the complainant to work from home;
> 2) in the January 7, 2020, email, threatening a future disciplinary hearing about his email communications;
> 3) in the January 7, 2020, email, placing him on temporary leave with pay pending a medical assessment;
> 4) in the January 7, 2020, email, requiring him to undergo an FTWE; and
> 5) in the January 7, 2020, email, indefinitely suspending the investigation into his work refusal.

a. The work-from-home order

[193] The first action that the respondent took after the refusal-to-work complaint was made, on December 22, 2019, was to instruct the complainant to work from home.

The reasoning was that he would be removed from the workplace or from the circumstance that led to his perception of danger.

[194] There was no disciplinary intent in asking the complainant to work from home. The employer acted quickly to protect him as was its obligation. In the circumstances working from home was a reasonable choice as the complainant was equipped to do so. I find that removing an employee from a perceived danger, in the circumstances of this case, does not fall within the catalogue of actions or inactions prohibited by s. 147 of the *Code*.

b. The threat of a future disciplinary hearing

[195] Among other proscribed actions, s. 147 prohibits an employer from taking "… any disciplinary action against or threaten to take any such action against an employee …" for having acted in accordance with Part II of the *Code*. The FTWE suspension email informed the complainant that the Watch List email was inappropriate, that it would not be tolerated, and that a disciplinary hearing would be held in the future to address it. The respondent intended to hold a disciplinary hearing to specifically address the contents of the Watch List email as well as email communications from the complainant during that period that it found threatening and aggressive. In its evidence, the employer stated that it only intended to hold a disciplinary hearing if the FTWE concluded that the complainant's behaviour was culpable. I find that this threat of a future disciplinary hearing falls within the parameters of s. 147 of the *Code*.

[196] Although it has already been set out, it is convenient to reproduce the Watch List email again, as follows:

> *Subject: You say I am on the "Watch list"*
>
> *Hello Sir,*
>
> *You are a coward* [GC]*. You robbed me out of many employment opportunities after your managerial friends induced me into a fraud contract to settle. I was placed in a box and threaten many times over since.*
>
> *You labelled me a terrorist in front of our colleagues and not a single one was able to speak against you. You benefit from your whiteness which allows you to speak like that, and still continue to terrorize me after work in a public setting. Please note, the next time you continue to terrorize me in a public place* ***I will defend***

> ***myself by all any mean. I am not afraid of anymore consequences from now on.***
>
> [Name redacted] *you've accommodated me to unit that I left in bad terms, with many angry people with hostility towards me. This was not fair, but I wanted to make you aware of how I am feeling before they punish me.*
>
> *Again, you're a coward* [GC] *and your protectors are cowards.* ***I do not care of any type of disciplinary actions at this point*** *but I wanted to make you aware of how your actions are cowardly.*
>
> [*Sic* throughout]
>
> [Emphasis added]

[197] Mr. Côté testified that he found the content and tone of the Watch List email threatening and inappropriate. He concluded that the email, taken in the context of the flurry of emails that the complainant sent over the brief period, warranted a disciplinary response. He was also sufficiently concerned about the complainant's overall well-being and wanted to satisfy himself that the complainant's behaviour was culpable, to justify imposing discipline.

[198] While I find the tone and content of the Watch List email inappropriate in any workplace and deserving of a disciplinary response from management, I also accept the complainant's testimony that he felt that he was not being heard and that he sent the email out of frustration. However, under the *White/Burlacu* test, it is the employer's intent and response to this email that must be considered.

[199] I further find that the email's content is intrinsically linked to the refusal-to-work complaint because it provides the context of the complainant's perception that there was a danger in his workplace. However, in assessing whether there was retaliation, I must evaluate the employer's intent and actions.

[200] I need not make any factual finding as to whether the alleged encounters with GC and the statements attributed to him occurred. It suffices for my purpose to accept, as did the respondent, that the complainant experienced or perceived a danger in his workplace from those alleged encounters and utterances.

[201] It is also irrelevant to my inquiry that in May 2020, the respondent found that there was no danger.

[202] For the purposes of the reprisal-complaint regime, the Board need not assess the legitimacy of the exercise of the right under s. 128 of the *Code*.

[203] I draw support from the legislative scheme in ss. 133 and 147 of the *Code*, specifically ss. 133(6) and 147.1. Under s. 133(6), Parliament has created a rebuttable presumption under which a complaint is made in respect of the exercise of a right under s. 128. Once it is established that a complainant has exercised a right under s. 128, the burden then shifts to the respondent to prove that a contravention has not occurred. Section 147.1 permits a respondent to take disciplinary action against a complainant who has exercised rights under ss. 128 and 129 after all the investigations and appeals have been exhausted, provided that it can demonstrate that the complainant "wilfully abused those rights."

[204] In this case, the respondent does not contest that the complainant properly exercised his right under s. 128.

[205] I understand that the respondent probably found itself between the proverbial rock and a hard place in terms of how it ought to address the Watch List email as well as the complainant's overall behaviour. From the disciplinary perspective, saying nothing at the time could have led to condonation allegations in the future. On the other hand, putting the complainant on notice of a future disciplinary response could have attracted a reprisal complaint, as in this case.

[206] In my view, ss. 133(6) and 147.1 of the *Code* operate together as a checks-and-balances system to prevent abuses of ss. 128 and 129.

[207] I find that the content of the Watch List email was factually linked to the exercise of the complainant's right under s. 128 of the *Code*. The threat of future disciplinary action related to the tone and content of the Watch List email that in turn related to the allegations concerning GC.

[208] Adopting the *White/Burlacu* test, I find that the first and second steps of the test have been met, however, the complaint fails on the third step, which is establishing a direct link between steps one and two. Given the reverse burden of proof under s. 133(6) of the *Code*, I find that the respondent rebutted the presumption with clear and convincing evidence.

[209] I therefore dismiss the complaint on this ground.

c. Removal from the workplace, and leave with pay

[210] In the respondent's FTWE suspension email dated January 7, 2020, Mr. Côté informed the complainant that he was being placed on leave with pay pending the FTWE and that he was not to report to work or communicate with anyone at the workplace, except him.

[211] According to Mr. Coté's evidence, the employer was concerned about the threatening nature and tone of the complainant's email communications. Placing him on leave with pay and removing his workplace access were reasonable and legitimate actions of an employer faced with the unpredictability of the complainant's behaviour. There was no punitive intent. I find that removing the complainant from the workplace and placing him on leave with pay did not fit within the catalogue of prohibitions in s. 147 of the *Code*.

d. Requirement for a medical assessment

[212] The respondent informed the complainant that before it held a disciplinary hearing, it wanted to ensure that there was no medical basis for his behaviour. It argued that it had reasonable and probable grounds to request a medical assessment so that it could determine whether his behaviour was culpable or non-culpable.

[213] Requesting information to assess an employee's culpability for threatening and inappropriate workplace communications is a reasonable exercise of managerial authority in the circumstances. I do not find that that action fell within the prohibitions in s. 147.

e. The work-refusal investigation being put on hold

[214] I do not find that putting the investigation on hold fell within the actions or inactions prohibited by s. 147. There was no evidence of retaliatory intent on the respondent's part in putting the investigation on hold for a brief period. In any event, the respondent carried out the investigation as required by the provisions of the *Code*.

f. Conclusion on the first complaint

[215] Although the threat of a future disciplinary action fell within the catalogue of prohibited actions under s. 147 of the *Code*, the respondent established that there was no direct link between that threat and the exercise of the complainant's right under Part II of the *Code*.

[216] The complaint is dismissed.

2. The second reprisal complaint — Board file no. 560-02-43143

[217] On June 16, 2021, the complainant made a complaint under s. 133 of the *Code* stating that the respondent terminated his employment for exercising his right under s. 128 and for refusing to go through a psychiatric evaluation after it alleged that he had a condition that prevented him from carrying out the duties of his position. He alleged that the termination of his employment was a reprisal for exercising his rights under ss. 128 and 129 and for refusing to undergo the psychiatric assessment that the employer had ordered. To better understand the thrust of the complainant's position, I find it useful to reproduce, in full, section 3 of the complaint form (which is a concise statement of each act, omission, or other matter that gave rise to the complaint):

> *On June 16, 2021, my employer has informed me that they terminated my employment in a letter dated June 9, 2021, quoting Section 12(1)(e) of the Financial Administrations Act because I refused to go through a psychiatric evaluation. This is in violation of section 133 and 147 of the Canada Labour Code. The employer penalized me with termination of employment for exercising my rights under s. 128 and 129.*
>
> *1. In December 2019, I exercised my rights to refuse dangerous work under section 128 of the Code because my life was threatened by* [GC] *in multiple occasions. I feared for my life and reported the situation to the Toronto Police.*
>
> *2. On January 7, 2020, before the work refusal investigations can commence, I was suspended from work and sent home.*
>
> *3. The employer proceeded with the investigation under section 128 of the Canada Labour Code without my presence.*
>
> *4. On May 4, 2020, the employer notified me of the Workplace Health and Safety Committee investigation results under subsection 128(15) of the Canada Labour Code while I was suspended. (**See attached**)*
>
> *5. On May 14, 2020, the employer informed the Minister of Labour as per section 128(16) of the Canada Labour Code, and provided the Minister the reports completed by the employer and the Workplace Health and Safety Committee.*
>
> *6. The employer picked a psychiatrist and ordered me to go a psychiatric evaluation (**see attached**).*
>
> *7. On October 26th, 2020, I was forced to go on sick leave that he did not file for after I refused to see the psychiatrist. The circumstances of my suspension were communicated to others, including the Employment Insurance commission*

> *where the employer submitted inaccurate Record of Employment that stated the reason for not working was due to "illness."*
>
> …
>
> *The employer unreasonably argues what they frame as "administrative actions" trumps the mandatory requirement of the Canada Labour Code. Proceeding with the work refusal investigations without my presence is in the contrary to the Code. The Code requires the the employee to be present during the Code mandatory investigations.*
>
> *This mandatory requirement was highlighted by Madam Justice Roussel of this Court:*
>
> *"Once an employee reports a refusal to work, the employer must immediately investigate the danger in the presence of the employee who reported it and prepare a written report setting out the results of the investigation (ss 128(7.1) of the CLC). Following the investigation, if the employer agrees that there is a danger, the employer must take immediate action to protect employees from the danger (ss 128(8) of the CLC)" in Karn v. Canada (Attorney General), 2017 FC 123 (CanLII) at para 7.*
>
> *Similarly, arbitral jurisprudence from the Canada Industrial Relations Board holds that the investigations to the work refusals cannot occur without the employee "The work refusal process is predicated on the employee being present to participate in the Code's mandatory investigation process. This cannot occur if the employee is not at work" Bazrafshan v Canada Post Corporation, 2014 CIRB 707 (CanLII), para 72*
>
> *The requirement to go through a psychiatric evaluation is designed for the employer to circumvent the Canada Code Process under section 128 and 129. Further, the test for requiring an employee to undergo a psychiatric evaluation is higher than that of an FTWE, given the privacy concerns (Burke at para 435, 2019 FPSLREB 89).*
>
> *Because the employer has terminated my employment this impacts my appeal under section 129(7) before the Canada Industrial Relations Board. This is a violation of the Code. An employer may take disciplinary action for a good reason, a debatable reason, or no reason at all, as long as the CLC is not violated (see Ouimet v. VIA Rail Canada Inc., [2002] CIRB No. 171 (QL) at para. 56).*
>
> *Furthermore, the employer is alleging that I have a condition that prevents me from working and forced me to go on sick leave, and displaced leave with pay. The collective agreement provides in article 33.05 that an employee shall not be granted two (2) different types of leave with pay or monetary remuneration in lieu of leave in respect of the same period of time.*
>
> *Where an employer pleads that an employee's illness has rendered the employee incapable of doing their job, the onus is on the employer to demonstrate that is the case para 55 in Irvine v.*

> *Gauthier (Jim) Chevrolet Oldsmobile Cadillac Ltd., 2013 MBCA 93. The granting of sick leave, with or without pay, is* ***conditional on the existence of an illness or injury that prevents the employee from performing his or her work*** *Para 86 - 2006 PSLRB 42. The employer argues a condition exists that prevents me from doing my job, the onus is on the employer to proof that.*
>
> [*Sic* throughout]
>
> [Emphasis in the original]

[218] On June 9, 2021, the respondent communicated its decision to terminate the complainant's employment for non-disciplinary reasons (under s. 12(1)(e) of the *Financial Administration Act* (R.S.C., 1985, c. F-11; *FAA*)). I have excerpted the relevant portions of the termination letter as follows:

> …
>
> *The purpose of this letter is to communicate my decision further to management's emails of March 22, 2021, March 29, 2021 and April 16, 2021, as well as the facilitated discussion that took place on May 20, 2021, that communicated the consequences of not participating in the fitness to work evaluation (FTWE) process.*
>
> …
>
> *Decision*
>
> *As outlined above, management has taken numerous steps during the last seventeen (17) months in order to support you in completing the required medical evaluation with the hopes that it would confirm your fitness to return to the workplace. Throughout the entire process, the intention has always remained to ensure that you are fit to conduct your duties while also ensuring the health and safety of all employees. Notwithstanding these efforts, you have failed to assuage management's concerns with the troubling and menacing nature of your communications of January 6, 2020 and January 7, 2020, as well as the evident change in your overall behaviour leading up to these communications. You stated that a virtual assessment occurred with your Doctor on June 10, 2020, yet, despite twelve (12) months passing, you have not provided your Doctor's assessment as it relates to either your fitness or inability to return to the workplace.*
>
> *You have made it clear that you do not intend to participate in good faith.*
>
> *This situation cannot be sustained any further. Seeing that the Employer has made great efforts to impress on you the importance of actively participating in the fitness to work process and that you categorically refuse to do so, I am left with no choice but to enforce a resolution to the matter.*

> *Therefore, in light of the above and in accordance with Section 12(1)(e) of the* Financial Administration Act*, I hereby terminate your employment with Employment and Social Development Canada effective close of business today.*
>
> …

[219] Applying the *White/Burlacu* framework, I must ask the following questions:

1) Did the complainant act in accordance with Part II of the *Code* or seek the enforcement of any of that Part's provisions (s. 147)?
2) Did Has the respondent take and action against the complainant prohibited by s. 147 of the *Code* (ss. 133 and 147)?
3) Is there a direct link between (a) the action taken against the complainant and (b) the complainant acting in accordance with part II of the *Code* or seeking the enforcement of any of that Part's provisions?

[220] I take from the complainant's narration of the events that led to the complaint three items that correspond to step one of the *White/Burlacu* test, namely, 1) the refusal-to-work complaint that he made in December 2019, 2) his demand that he be physically present for the investigation of the complaint in January and February of 2020, and 3) his refusal to undergo the IME's evaluation that the respondent arranged (the psychiatric assessment, according to him).

a. Step one — did he exercise a right or seek to enforce a provision of the *Code*?

[221] He exercised his right under s. 128 of the *Code* when he made the refusal-to-work complaint on December 19, 2019.

[222] He also insisted that he had to be physically present for the investigation and that he chose not to participate if he were to remain suspended from the workplace. He argued that under s. 128(7.1) of the *Code*, it was mandatory for him to be present for the investigation. Section 128(7.1) provides, "The employer shall, immediately after being informed of a refusal under subsection (6), investigate the **matter in the presence** of the employee who reported it" [emphasis added].

[223] Initially, the respondent informed the complainant that the investigation would be put on hold (the January 7, 2020, FTWE suspension email). On January 16, 2020, it informed him that it would conduct the work-refusal investigation by email and telephone and asked him to complete the necessary forms. He declined to participate, as he wanted to be present, in person.

[224] On January 24, 2020, it sent him a series of questions, as part of the investigation. He responded with this:

> …
>
> *With respect, and I must repeat myself. I request that this investigation to [sic] be conducted in my presence as the Code mandates, and not while I am dismissed and not allowed to be present at my workplace and where the December 20th incident occurred.* ***The incidents occurred both inside and outside of the workplace****. You're unfair and already alleged that I am the "dangerous" one.*
>
> *You're disadavtanging* [*sic*] *me by trying to conduct this investigation without my presence when I requested to participate in the investigation in person.*
>
> [Emphasis in the original]

[225] The complainant's reference to *Bazrafshan* to support his position that his presence for the investigation was mandatory was misplaced. At paragraph 72 of *Bazrafshan*, the CIRB stated that the work-refusal process was predicated on the employee being present to participate in the *Code*'s mandatory investigation process and that the process could not occur if the employee was not at work. In that section of its decision, the CIRB considered whether the complainant had demonstrated that a valid work refusal had occurred for the purposes of s. 133(6) (reverse onus) of the *Code*. The CIRB did not interpret s. 128(7.1) of the *Code*.

[226] I find that for purposes of deciding this complaint, the Board does not need to decide whether the reference to "in the presence of" in s. 128(7.1) of the *Code* means physical presence or some other presence and whether it required, as the complainant argues, that he be reinstated to the workplace for the purposes of the investigation. My decision must instead focus on whether the employer's decision to proceed with the investigation while he was on leave with pay was a retaliatory act. I find that there is no evidence at all of such an intent on the part of the employer and that the employer has successfully rebutted the presumption against it during the testimony of its witnesses, who clearly explained their decisions and whose evidence disclosed no disciplinary or inappropriate intent at all.

[227] Participating in an investigation in the context of this case did not require a physical presence.

[228] While an employer's investigation of a work-refusal complaint is mandatory, I do not find that the refusing employee's physical presence for the investigation is mandatory. I am prepared to find that in the context of s. 128(7.1), the refusing employee must be allowed to participate in the investigation.

[229] Despite the fact that I need not decide the issue of the employee's right to be physically present during an investigating, I note that in this case, the complainant flatly refused to participate and insisted that he had to be physically present. The incident that he reported ostensibly occurred outside the workplace. He insisted in fact on returning to the workplace, which the employer was not willing to allow, given the question of his state of mind. In the circumstances, the presence requirement can be read as a participation requirement.

[230] I would further draw the complainant's attention to s. 128(12) of the *Code*, which states as follows:

> ***128(12)*** *The employer, the members of a work place committee or the health and safety representative may proceed with their investigation in the absence of the employee who reported the matter if that employee or a person designated under subsection (11) chooses not to be present.*
>
> ***128(12)*** *L'employeur, les membres du comité local ou le représentant peuvent poursuivre leur enquête en l'absence de l'employé lorsque ce dernier ou celui qui a été désigné au titre du paragraphe (11) décide de ne pas y assister.*

[231] I note further that during the relevant period, the complainant constantly made his presence and arguments felt in the workplace through his copious and rampant email communications.

[232] I conclude that the complainant did not seek the enforcement of a provision of a section of Part II of the *Code* when he refused to participate in the refusal-to-work complaint investigation. In any event, the respondent completed the investigation, as mandated by s. 128 of the *Code*.

[233] I find that there is no evidence of any employer intent to retaliate against the complainant in refusing to reinstate him to the workplace for the purpose of the investigation or allow him to be physically present in the workplace during that investigation. The employer has successfully rebutted the presumption against it in

this case and has convinced me that it acted reasonably and without any disciplinary intent.

b. Step two — did the respondent take a prohibited action against the complainant in the 90 days before the complaint was made? Did it take any prohibited action against him?

[234] The first alleged prohibited action that occurred within the 90 days preceding the complaint was the termination of the complainant's employment. Termination of employment is one of the prohibited actions catalogued in s. 147 of the *Code*.

[235] The second alleged action was the investigation of the refusal-to-work complaint without the complainant's physical presence. This alleged action did not occur with the 90 days before the complaint was made. Furthermore, it does not fall within the catalogue of prohibited actions in s. 147.

[236] The third alleged action that contravened s. 147 was the respondent's requirement that the complainant undergo an IME's evaluation. I must reframe this requirement to reflect exactly what the respondent instructed within the 90 days before the termination of employment was effected. In April 2021, it gave the complainant two options: 1) undergo an IME, or 2) provide the report that Dr. Cooke had completed.

[237] I find that the respondent's request for the FTWE did not fall within the catalogue of the prohibited actions in s. 147.

c. Step three — a direct link

[238] The next step of the *White/Burlacu* test is to assess whether there is a direct link between the action taken and the complainant's action in accordance with Part II of the *Code*. As the Board explained in *Burlacu*, when there is a reverse onus of proof, the respondent must demonstrate on the balance of probabilities that the impugned action was not taken because the complainant exercised the right to refuse work that he or she considered dangerous. It is a question of causation (see *Burlacu*, at paras. 106 and 109).

[239] At this stage of the analysis, I must determine whether there is a causal link between the respondent's impugned action and the complainant's exercise of his rights under Part II of the *Code*. Since I have determined that neither the requirement for a

fitness-to-work certification nor the completion of the refusal-to-work complaint investigation fell within the prohibited actions in s. 147, the only respondent action to assess under the third step is the termination of the complainant's employment on June 9, 2021.

[240] The question that I must answer is whether the complainant's employment was terminated because he acted in accordance with or in furtherance of Part II of the *Code*. In other words, is there a causal link between the termination of his employment and the exercise of his rights under Part II of the *Code*?

[241] Based on the vast documentary and testimonial evidence, I find that there was no causal link between the two events. The complainant made the refusal-to-work complaint in December 2019; the employer's investigation was completed in May 2020 with a finding that there was no danger. By June 2021, when the respondent was contemplating terminating the complainant's employment, the refusal-to-work complaint was nowhere on its radar. In the 90 days before the complaint was made, the respondent dealt with the complainant in the context of obtaining information relevant to returning him to the workplace.

[242] I conclude that the termination of the complainant's employment on June 9, 2021, did not constitute a reprisal within the meaning of s. 147 of the *Code*.

[243] Therefore, I dismiss the complaint.

3. The first grievance — Board file no. 566-02-42421

[244] On October 30, 2020, the grievor grieved the following:

> *… being placed on Sick Leave with Pay as of October 26th, 2020 is a forced absence of leave. This is a disguised disciplinary action that repudiates the essential obligation of the contract of employment and is therefore a constructive dismissal. The adverse actions taking* [*sic*] *against me is* [*sic*] *a retaliation for making a health and safety complaint.*

a. Chronology of the salient facts

[245] On January 7, 2020, the employer requested that the grievor undergo an FTWE, to determine his fitness for duty (for the purposes of this grievance, I need not assess the legitimacy of that request). To facilitate this process, it removed him from the

workplace and placed him on leave with pay. I heard testimony from Mr. Côté that this was done to ensure that the grievor's removal from the workplace would not have any adverse financial impacts. It was also expected that the process would be swift.

[246] On February 6, 2020, the grievor acknowledged receipt of the FTWE package and informed the employer that he was waiting for a medical appointment date and that he would let it know when the assessment concluded.

[247] On April 4, 2020, he informed the employer that he had obtained a medical appointment with his physician for June 10, 2020, and that he would be working to get the assessment completed.

[248] On June 3 and 4, 2020, he emailed Mr. Côté twice, alleging that he had been subject to discrimination, racism, and Islamophobia in the workplace. He also questioned whether GC had been ordered to undergo an FTWE.

[249] On June 16, 2020, he emailed Mr. Côté, stating that he was "… currently at the hospital because this blatant racism and threat to [his] life has taken a toll on [him]." He asked that he communicate with someone other than Mr. Côté from then on.

[250] On June 17, 2020, he received an email from Ms. Paradis, introducing herself as the new manager, which stated in part as follows:

> …
>
> *… Charles did mention that you were in the hospital, I hope you are doing well and did not get Covid* [*sic*]. *If you did, please advise me, we'll work together to ensure that you are taking care of yourself.…*
>
> *I was advised that you were scheduled for a fitness to work evaluation on June 10, 2020 and that you should be providing documentation filed by your doctor this week. I would appreciate* [*sic*] *if you could send the documentation my way.*
>
> …

[251] The grievor responded on the same day as follows:

> *Good Afternoon Ms. Paradis,*
>
> *Nice virtually meeting you.*
>
> *I wanted to provide you with an update.* ***On June 10th my physician*** [*sic*] ***office arranged a virtual meeting between myself and the doctor.***

> ***The letter from the employer was recently submitted to the doctor*** [*sic*] ***office. The doctor has ordered me to another meeting scheduled on July 8th. I will forward you the document as soon as I receive it.***
>
> …
>
> [Emphasis added]

[252] Ms. Paradis emailed him on July 9, 2020, asking about the FTWE and whether the documentation was completed the previous day during his appointment. The grievor responded that he had the appointment on July 8, 2020, as scheduled, and that the doctor was working on completing the documentation. He asked for the mailing address where the documentation should be sent.

[253] Ms. Paradis provided the mailing address to the grievor on July 14, 2020, and asked him to confirm when the doctor expected to complete and send the documentation. He responded with this: "I am currently going through a [*sic*] therapy. My specialist is reviewing that and the situation that brought me to the emergency hospital recently."

[254] Ms. Paradis followed up on July 23, 2020, inquiring as to when his doctor might have the documentation ready for the employer.

[255] On July 23, 2020, he notified Ms. Paradis that he had a virtual follow-up appointment with his doctor on July 8, 2020. He replied as follows:

> …
>
> *In his communication to me, my physician informed me that he'll be addressing the letter sent to him by the employer in the near future. He received the letter shortly after our 1st virtual meeting on June 10th, I've had other follow-up meetings with Dr. Cooke.*
>
> …

[256] Ms. Paradis followed up again on July 31, 2020. She and the grievor had a telephone conversation on that date. According to her, he informed her that he was open to being evaluated through Health Canada if the employer felt that his doctor was taking too long. He stated that his doctor did not want to be disturbed and that he would complete the report in his own time and not on the employer's schedule. Furthermore, the grievor had started taking medications, and his doctor had mentioned to him that he should not rush back to work.

[257] Ms. Paradis followed up again on September 3, 2020. The grievor responded as follows on the next day:

> *Good morning Karyne Paradis,*
>
> *I am currently enrolled in a wellness program. I have no update for you yet.* ***My physician will submit the assessment directly to me to respect my privacy, and I will transmit it to you as soon as I receive it.***
>
> ***As an option, if you require me to go through Health Canada Assessment you may send me the consent forms to start that process, perhaps it'll be faster****.*
>
> *If further information is needed after the assessment is done then please communicate it directly with me, and I will forward it to my physician to respect my privacy. Please ensure all communication that's needed to go through me first.*
>
> ***Again, if you rather go through Health Canada Assessment then I am open to it as well.***
>
> *Thank you*
>
> …
>
> [Emphasis added]

[258] On September 24, 2020, the employer wrote to the grievor as follows:

> …
>
> *I am following up on our last email conversation on September 4th. You had confirmed not having received your assessment yet from your physician and did take note of it. You also mentioned being enrolled in a wellness program, I hope you enjoy it and your* [*sic*] *find it beneficial.*
>
> ***You now have been out of the office for more than 8 months, on leave with pay, and management has yet to receive confirmation of your fitness to work. Therefore, unless we get the assessment by your physician by October 23rd 2020, we will have to code your absence as sick leave from October 26 until your return to work. For your information as of September 23rd, 2020, you show a balance of 167 hours of sick leave.***
>
> ***Given that there is no guarantee as to when you will be able to provide the documentation filled out by your physician, we are looking for other medical assessors in Toronto right now. You mentioned Health Canada but unfortunately given the COVID-19 situation all assessments have been suspended. As soon as I get more details on [the] process to book appointments with an Independent Medical Assessor and what is required and dates, I will let you know*** *and we'll work together to process any documents should it be required.*

…

[Emphasis added]

[259] On September 30, 2020, the employer informed the grievor that it had secured an appointment with an IME, Dr. BB, for November 2, 2020, at 10:30 a.m. The grievor was to confirm his attendance by October 16, 2020. The employer also informed him that if it did not receive a fitness-to-work certificate from the grievor's doctor by October 23, 2020, it would start coding his absence from work as sick leave, starting on October 26, 2020.

[260] The grievor informed the employer that he chose to wait for his doctor to complete the assessment or to have it done through Health Canada. He asked it to confirm the type of assessment it sought: an FTWE or a psychiatric evaluation by a psychiatrist.

[261] The employer confirmed the nature of the information it was requesting though the IME, who was Dr. BB. In an email dated October 23, 2020, Ms. Paradis wrote this:

> *Dr.* [BB] *is a Independent Medical Evaluator (IME) and there is no difference between his role and a Health Canada Medical Evaluator. We opted to offer you this solution to allow you to address the issue quickly and for you to reintegrate our team and also because you proposed to be evaluated by Health Canada. The type of doctor chosen is based on the observed problematic in the workplace. You have mentioned being evaluated by a specialist in mental health so we requested a specialist in the same area of expertise to fill out the fitness to work assessment quickly.*
>
> *Here are the 3 choices you have at this moment since your sick leave bank will be used as of next Monday, October 26th, 2020:*
>
> *1. If you choose to meet with the Independent Medical Evaluator (IME), this will solve the sick leave use situation faster.*
>
> *2. Health Canada: A very long process, you could be on sick leave for a long time.*
>
> *3. We wait for your physicians evaluation, you could be on sick leave for a long time.*
>
> *Let me know your choice.*
>
> …
>
> [*Sic* throughout]

[262] The grievor responded that he chose to wait for his physician to complete the assessment or to go through Health Canada.

[263] On October 24, 2020, the grievor wrote to Ms. Paradis as follows:

> …
>
> *You informed that I will be on Sick Leave while I am waiting for the assessment you're ordering to be concluded by my physician. You are displacing Leave with Pay with Sick Leave With Pay as of October 26th.*
>
> *Why do you believe that I am sick and unable to do my job until my physician completes his assessment?*
>
> *I am requesting that my current status on Leave with Pay not be interrupted until my physician completes the assessment or a physician from Health Canada evaluate my fitness to work.*
>
> *I'll appreciate your response giving me your justification of putting me on Sick Leave With Pay in a timely matter, so that I can draft my grievance and submit a section 133 complaint on this issue within the prescribed period.*
>
> …

[264] The employer changed the grievor's employment status from leave with pay to sick leave, effective October 26, 2020. In an email to him dated October 27, 2020, Ms. Paradis explained as follows:

> …
>
> *As you are aware, and as previously indicated, your absence from work at the current time is associated with management's concerns for your health and well-being that appear to have an impact on your ability to conduct your work. As you are also likely also aware, as per article 35.02 of your collective agreement, "*an employee shall be granted sick leave with pay when he or she is unable to perform his or her duties because of illness or injury*". As a result, Sick Leave is most certainly the appropriate type of leave to be utilized within this context. I recognize that management opted for another option at the beginning of the process, whereby Other Leave With Pay was granted to cover the period during which you would be awaiting an assessment, however, you were formally notified on September 24, 2020 that as of October 23, 2020, you would be considered to be on Sick Leave pending your medical assessment. I understand that you would much prefer to resume your functions and we certainly also wish for you to return, however, until we are able to obtain clarifications as to your fitness to work, this is the type of leave that should be utilized. Although we can certainly proceed with an assessment conducted by Health Canada, I must remind you again that the current delays are important and that you will remain on sick leave until the assessment is completed. Alternatively, we are again presenting you with the option to undergo an Independent Medical Evaluation which could occur within a shorter time frame.*

…

[265] The grievor filed the grievance on October 30, 2020.

b. Analysis and decision

[266] I have concluded that the employer did not engage in disguised disciplinary action when it changed the grievor's absence status from leave with pay to sick leave with pay on October 26, 2020. Therefore, I deny this grievance.

[267] In cases in which disguised discipline is alleged, the Board must look beyond the employer's characterization of its actions or activities. The concept of disguised discipline is common in labour relations and workplace situations. Arbitrators and adjudicators are routinely called upon to assess employer actions or inactions through the prism of disguised discipline. An adjudicator's primary task is to examine the purpose and effect of the impugned action.

[268] In *Bergey*, the Federal Court of Appeal endorsed the legitimacy of using the doctrine of disguised discipline to adjudicate claims of improper employer actions, as follows:

…

> *[34] … the Board developed the notion of disguised discipline, under which the Board characterizes certain decisions that the employer claims are non-disciplinary — and therefore non-adjudicable — as being in fact disciplinary in nature, which then clothes the Board with jurisdiction over such decisions and permits it to review them for cause. This Court and the Federal Court have both recognized the legitimacy of this approach ….*
>
> *[35] … through the doctrine of disguised discipline, the PSLREB (and prior iterations of the Board) were and are able to review employer decisions that the employer claims are shielded from review by the Board … the Board, both previously and currently, has jurisdiction to review decisions that result in termination, suspension or financial penalty claimed to be of an administrative nature if the Board finds that such decisions are in fact disciplinary ….*

…

[269] In this case, I must determine whether the employer's action of changing the grievor's leave status on October 26, 2020, was disguised disciplinary action. This is a

fact-driven inquiry, and I am guided by the following principles, drawn from the relevant jurisprudence:

- whether the employee's behaviour or conduct was culpable or non-culpable;
- whether the employer's action or inaction adversely affected the employee, bearing in mind that certain workplace adjustments, irrespective of their adverse impacts, are purely administrative;
- an employee's feelings about perceived unfair treatment do not convert an administrative action into discipline;
- whether the employer intended to correct or modify the employee's behaviour;
- whether the employer's decision is likely to be relied upon for future discipline;
- the employer's characterization of its decision is not determinative;
- whether the impact of the decision on the employee was significantly disproportionate to the administrative rationale; and
- whether the decision had implications for the employee's career (see *Frazee*, at paras. 23 to 25, and *Bergey*, at para. 37).

[270] Adopting the *Frazee* criteria as just set out, I conclude that changing the grievor's leave status from leave with pay to sick leave with pay and then sick leave without pay were administrative actions that were non-disciplinary.

[271] The grievor had the burden of proving on the balance of probabilities that the employer's actions were meant to correct his behaviour or to discipline him for some culpable behaviour. He failed to do so.

[272] Both Mr. Côté and Mr. Charette were clear in their testimonies that the employer required the medical information, to allow it to assess whether the grievor's behaviour was culpable. Indeed, the FTWE suspension email clearly set out the employer's position on this. While it considered the grievor's Watch List email inappropriate and warranting a disciplinary response, it specifically stated that it would not hold a disciplinary hearing until it received the requested medical information.

[273] The employer's concerns were clearly reflected in the FTWE letter that it sent to the grievor's health care provider that states in part as follows:

…

> *On January 6, 2020, Mr. Osman sent numerous emails to his Team Leader, expressing dissatisfaction with the work he was being assigned and the tools provided. In one of his emails, he requested leave from work until the investigation into his refusal to work was completed given that he had concerns about retaliation in the workplace (Appendix 4).*

Early the following day, on January 7, 2020, Mr. Osman sent his Team Leader an email in which he referred to continued harassment *(Appendix 5). Shortly after, he sent a subsequent inappropriate email from his work email address to* [GC]. *In his email, Mr. Osman indicated:* I will defend myself by all any mean. I am not afraid of anymore consequences from now on. *(Appendix 6)*

The fact that Mr. Osman felt the need to send multiple messages within a 48-hour window, as well as their inappropriate tone and content which was threatening in nature, has raised serious concerns with regards to Mr. Osman's overall well-being and current state of mind. Aside from the content itself, consideration is also given to the way in which this situation has escalated so rapidly.

As a result of this behaviour, and management's obligation to both support Mr. Osman's health and safety but also of the entire work environment, Mr. Osman was placed on leave with pay until he is assessed by a medical professional (Appendix 7). It is in this context that we are seeking your medical opinion. We understand that in the past, Mr. Osman has provided documentation attesting that he has no functional limitations associated with exercising his specific duties. This being said, although we are not noting issues with his performance, there are certainly concerns as it relates to his ability to successfully occupy the position without impacting his well-being or the well-being of others.

…

… I would greatly appreciate [*sic*] *if you could respond to the following questions:*

…

(3) Does Mr. Osman have any functional limitations or restrictions that need to be accommodated in the workplace? Please specify the limitations or restrictions and whether they are permanent or temporary.

(4) ***If Mr. Osman has functional limitations:***

> ***a) Does it impact his ability to complete the duties associated with his position in a manner as to respect the values and behaviours established within the ESDC Code of Conduct? If so, please explain.***
>
> ***b) Is there a causal relation between Mr. Osman's medical condition and the behaviour stated above? If so, please explain.***
>
> ***c) Are there any triggers that may or could impact Mr. Osman in the workplace? If so, please provide details and any measures that could be implemented to help.***

…

[Emphasis added]

[274] The grievor had the burden of proving that the employer engaged in disguised disciplinary action by placing him on sick leave with pay as of October 26, 2020. To meet it, he had to identify some behaviour on his part that the employer sought to correct and to demonstrate that the corrective action that the employer chose was punitive. He failed to meet this burden on both counts.

[275] The employer expressly stated that it had to assure itself that there was no underlying medical reason for the increasingly aggressive nature and tone of the grievor's correspondence. More than once, he indicated that his mental health was being affected; for instance, in his June 16, 2020, email to Mr. Côté, he stated that he was at the hospital because "… blatant racism and threat to [his] life [had] taken a toll on [him]." On July 14, 2020, he informed Ms. Paradis that he was "currently going through a [*sic*] therapy" and that his specialist was reviewing the situation that had recently led him to the hospital emergency department. During their telephone conversation on July 31, 2020, he informed Ms. Paradis that he had started taking medication and that his doctor had advised him that he must not be rushed back to work. On September 4, 2020, he informed Ms. Paradis that he was "enrolled in a wellness program".

[276] What I infer from all these facts is that placing him on sick leave was justified. I did not discern any disciplinary intent on the employer's part. To the contrary, the employer wanted to resolve the issue of the grievor's fitness to work as expeditiously as possible. It was the grievor that adamantly refused to either provide his doctor's report or consent to the FTWE. The relevant collective agreement specifically provided that "[a]n employee shall be granted sick leave with pay when he or she is unable to perform his or her duties because of illness or injury …". By the grievor's own representations to the employer, he was unwell. While I acknowledge that forcing an employee to use up previously accumulated sick leave bank could in some circumstances amount to a financial loss, the loss of sick leave credits through utilization does not necessarily amount to a financial penalty with the meaning of s. 209(1)(b) of the *Act* (*Rogers v. Canada (Revenue Agency)*, 2010 FCA 116 at paragraph 21)

[277] The grievance is denied.

4. The second grievance — Board file no. 566-02-43435

[278] The employer terminated the grievor's employment on June 9, 2021, for non-disciplinary reasons. The operative part of the termination letter states in part as follows:

> …
>
> *… management has taken numerous steps during the last seventeen (17) months in order to support you in completing the required medical evaluation with the hopes that it would confirm your fitness to return to the workplace. Throughout the entire process, the intention has always remained to ensure that you are fit to conduct your duties while also ensuring the health and safety of all employees. Notwithstanding these efforts, you have failed to assuage management's concerns with the troubling and menacing nature of your communications of January 6, 2020 and January 7, 2020, as well as the evident change in your overall behaviour leading up to these communications. You stated that a virtual assessment occurred with your Doctor on June 10, 2020, yet, despite twelve (12) months passing, you have not provided your Doctor's assessment as it relates to either your fitness or inability to return to the workplace.*
>
> *You have made it clear that you do not intend to participate in good faith.*
>
> *This situation cannot be sustained any further. Seeing that the Employer has made great efforts to impress on you the importance of actively participating in the fitness to work process and that you categorically refuse to do so, I am left with no choice but to enforce a resolution to the matter.*
>
> *Therefore, in light of the above and in accordance with Section 12(1)(e) of the* Financial Administration Act*, I hereby terminate your employment with Employment and Social Development Canada effective close of business today.*
>
> …

[279] The grievor filed his grievance on July 6, 2021, stating in part as follows:

> …
>
> *I also grieve the letter of termination dated June 9th, 2021,* ***received June 16, 2021****. The decision to terminate my employment is unwarranted, unreasonable, excessive and without just cause. I grieve that the employer did not have cause to terminate my employment pursuant to section 12(1)(e) of the Financial Administration Act.*
>
> …
>
> [Emphasis added]

[280] The employer issued the final-level reply on July 28, 2021, denying the grievance.

[281] The employer raised the issue of timeliness; however, there was no evidence to contradict the grievor's testimony that he received the termination letter on June 16, 2021.

[282] I find that the grievance was timely.

a. Chronology of the salient facts

[283] Most of the salient facts underlying the termination of the grievor's employment have been outlined already in this decision; therefore, I will address only the facts between October 2020 and the termination date. Suffice it to state that the requirement to provide a medical evaluation as to the grievor's fitness to return to the workplace continued to evolve between him and the employer. He insisted that the information be provided by his physician or through Health Canada, because of privacy concerns.

[284] The employer was not opposed to the grievor's preference; its concern was the length of time it would take to obtain the information. He stated that his physician would provide the information in his own time and that he should not be pressured by the employer. The Health Canada process would have also taken a long time due to a backlog that resulted from the COVID-19 pandemic. The faster process was through an IME paid for by the employer.

[285] In the email dated October 23, 2020, the employer provided the grievor with three options, as follows:

> 1) a meeting with the IME, which was a faster way to resolve the issue;
> 2) going through Health Canada, which was a very long process; or
> 3) waiting for the evaluation from the grievor's physician, which also involved a very lengthy wait.

[286] I note that previously, it took the grievor's physician, Dr. Cooke, approximately six months to complete such a report. The employer requested an evaluation on October 1, 2018, and Dr. Cooke responded on April 10, 2019.

[287] On November 5, 2020, the grievor signed a consent form to undergo an assessment by Health Canada.

[288] On November 25, 2020, the employer sought the grievor's consent to communicate directly with Dr. Cooke's office, in an effort to explain the urgency of the situation to receive his evaluation report. The grievor flatly refused to provide any such consent.

[289] The grievor's sick leave credits ran out as of November 30, 2020; therefore, his absence status became sick leave without pay.

[290] On March 15, 2021, the employer informed the grievor as follows:

> …
>
> *I am communicating with you to advise you that Health Canada has informed us that they are unable to carry out Fitness to Work Evaluations for the foreseeable future. As such, Health Canada has taken upon themselves to put in place a contract with Vector Medical in order to provide the services that they cannot offer a* [*sic*] *this time. In light of this new information, and in order to have the fitness to work evaluation completed in a timely fashion, we will initiate the required steps to have the assessment completed by Vector Medical. I will inform you once I have more information as to your upcoming appointment.*
>
> …

[291] The grievor responded as follows:

> …
>
> *I believe that you're using this health care requirement in bad faith. I have serious concerns about my privacy rights being breached. Please write to me the consequences that I will face by refusing to go through this assessment with Vector Medical, also in writing to help me understand please tell me why the doctor of my choice* [*sic*] *assessment was not acceptable. When you make these clear to me, I will seek legal advice in order to make the right decision.*
>
> …

[292] By March 2021, the parties had reached a stalemate. In the emails that follow, I particularly note the dates and times, to demonstrate the heightened tension between them.

[293] On March 16, 2021, the grievor sent two emails to the employer. The first was sent at 1:33 a.m., and in it, he took the position that the employer had already dismissed him from his employment by placing him on sick leave. He then asked it to respond to these three questions: 1) what were the consequences he would face by refusing to go through the assessment with Vector Medical, 2) why the doctor of his choice was not acceptable, and 3) what were the list of questions that the employer intended to ask the physician? He said that he would provide the employer with his answer once those questions were answered.

[294] At 8:15 a.m., on March 16, 2021, he emailed the employer again, providing it with his email address and requesting that it send his termination letter electronically, in the event that it decided to terminate his employment.

[295] On March 19, 2021, the grievor emailed the employer again, as follows:

> …
>
> *I want to remind you what the Courts says [sic] about requesting medical examination "The need for a medical examination is described as "drastic action" which must have a "substantial basis" and will only be required in "rare cases" Mr. Justice Shore in Canada (Attorney General) v. Grover, 2007 FC 28*
>
> ***In less than a year management requested that I go through 2 medical examinations. I cooperated and submitted Dr. Cooke's assessment in April 2019, you admitted that management accepted this with no issue.*** *Upon my return to the workplace, I was the victim of workplace violence. I made a workplace health and safety complaint. Then in January 2020, after I filed a refusal to work complaint under Canada Labour Code which management accepted, they forced me out and ordered me to go through yet another medical examination, these requests are made frequently, not rare* [*sic*]*. Do you expect me to submit a new medical examination twice year?*
>
> …
>
> *I do not understand your request. I am seeking legal advice about this matter, please kindly write to me in detail the following:*
>
> *1. Consequences that I will face by refusing this assessment with Vector Medical due to concerns for my privacy*
>
> *2. Why is psychiatric assessment necessary?*
>
> *3. Please provide me with the sub-contract agreement that I was not a party to between Health Canada and Vector Medical involving me.*
>
> …

[296] On March 22, 2021, at 5:02 p.m., the employer gave the grievor two options: 1) consent to undergo an FTWE with Vector Medical, or 2) provide the full assessment conducted by Dr. Cooke. He had until April 6, 2021, to decide.

[297] The grievor responded on March 22, 2021, at 5:31 p.m., stating that he would not consent to go through an FTWE with Vector Medical and that he would not submit to a psychiatric assessment because it was "… a major invasion of [his] privacy rights." He then asked the employer to send him the termination letter by email.

[298] That the grievor's physician, Dr. Cooke, was a psychiatrist was no secret to the parties. In April 2019, Dr. Cooke provided a medical evaluation to support the grievor's return to the workplace in which he clearly stated that the grievor had been under his psychiatric care over the period from December 2014 to then. The grievor's objection that the employer requested a psychiatric assessment seems misplaced.

[299] On March 29, 2021, the employer responded to the grievor's email and explained to and assured him that the information requested as part of the FTWE would be strictly limited to his functional limitations. The choice of health care professional was based on the specialty of the physician that he had chosen to do his evaluation in June 2020. The email further stated as follows:

> …
>
> *In your recent email of March 22, 2021, you indicated* "please send me the termination letter by this week"*. It is therefore my understanding that you are requesting that the Employer proceed with your dismissal.*
>
> ***I want to reiterate that management has not, at this point, made the decision to terminate your employment. Similarly, I must also confirm that management has not asked you to resign from your position. Should this however be your decision, I must ensure that you do not feel pressured to resign.***
>
> ***Seeing that my concerns regarding your wellbeing*** [*sic*] ***are still present, I have a responsibility to ensure that you are not making any decision hastily. I highly encourage you to discuss the impacts of your future decisions*** [*sic*] ***as it relates to your employment with your doctor****. I also strongly encourage you to reach out to your bargaining agent or legal counsel and to the Employee Assistance Program at 1-800-*[redacted].
>
> *The Canada Pension Center* [*sic*] *(CPC) could also provide additional input on the impacts of the end of your employment.*

> *The CPC can be reached at 1-800-*[redacted] *from Monday to Friday between 8:00 a.m. to 4:00 p.m.*
>
> *I want to ensure that you take the time needed to evaluate what the end of your employment would represent for you, prior to you communicating any further decision with me.*
>
> ***In determining how you wish to respond to the current situation and which steps you chose to proceed with, I must ensure that you comprehend the consequences of your decisions. To this end, please note that should you maintain your refusal to either participate in a FTWE or provide Dr. Cooke's evaluation by April 6, 2021, I will have no other option but to recommend that your employment be terminated.***
>
> …
>
> [Emphasis added]

[300] On April 6, 2021, the grievor emailed the employer, confirming his refusal to go through a psychiatric assessment because it was requested in bad faith and was a breach of his privacy rights.

[301] On April 16, 2021, the employer wrote to the grievor and encouraged him to reach out to his bargaining agent, to discuss the impact of his decision. It proposed the facilitated conversation with the grievor as an effort to attempt to reach an understanding of the situation. He was given a deadline of April 30, 2021, to revisit his decision to not participate in an FTWE or to provide the report from his doctor. He was also asked to inform it if he wished to use the opportunity to have a facilitated conversation.

[302] The parties agreed to the facilitated conversation on May 20, 2021.

[303] Following the conversation, the grievor wrote to the employer, stating that "[t]he discussion was extremely unhelpful" because it did not consider any of his points. He also stated that the discussion solidified his position of refusing to consent to a psychiatric assessment.

[304] The parties then exchanged their respective accounts of the facilitated conversation. The tone of the grievor's emails at that time became increasingly accusatory and aggressive. The employer summed up the parties' respective positions in an email dated May 26, 2021, as follows:

…

> *I do feel it is important that I state on the record that you are summarizing the May 20th discussion in a very misleading and untruthful manner.…*
>
> …
>
> *During our conversation, you had the opportunity to express your concerns and point of views and I had the opportunity to respond as well as present you with my perspective on things.*
>
> *Again, we have been working with you for several months now to resolve the situation in an effort to prepare for your reintegration in the workplace. Ultimately, it is fair to say that we do not agree on how things should have been handled nor on how to move forward. At the end of our discussion last week, we talked about next steps further to you making it very clear that you were not going to provide a completed fitness to work assessment. In doing so, you fully recognized that this decision had associated consequences.*
>
> ***I must say, however, that I found our discussion very useful in order to understand your point of view. Unfortunately, it also allowed me to come to the conclusion that the steps management has taken during the last few months to secure a FTW evaluation for you were done in vain. Seeing that you confirmed, during our conversation, that upon receiving the September 24, 2020 email sent by Karyne Paradis, you decided that you would no longer be participating in this process by any means, evidently, your consent to move forward with a Health Canada assessment provided on November 5, 2020 was in fact dishonest.***
>
> …
>
> ***It is certainly very unfortunate that your apparent frustration is clouding the path to a positive outcome. I will continue to communicate with you as it relates to upcoming decisions in resolving the current situation, however, I believe that enough effort has been put on attempting to provide you with a complete understanding of management's decision-making process and that continued efforts to do so are no longer warranted.***
>
> …
>
> [Emphasis added]

[305] By letter dated June 9, 2021, the employer terminated the grievor's employment, under s. 12(1)(e) of the *FAA*. The letter extensively outlined the parties' interactions starting from January 7, 2020, when the grievor was instructed to remain off work on leave with pay pending an FTWE.

[306] The grievor testified that he received the termination letter on June 16, 2021, and he filed his grievance on July 6, 2021. The employer denied the grievance on July 28, 2021.

b. Analysis and decision

[307] Section 12(1)(e) of the *FAA* provides as follows:

…	[…]
12 (1) *Subject to paragraphs 11.1(1)(f) and (g), every deputy head in the core public administration may, with respect to the portion for which he or she is deputy head,*	***12 (1)*** *Sous réserve des alinéas 11.1(1)f) et g), chaque administrateur général peut, à l'égard du secteur de l'administration publique centrale dont il est responsable :*
…	[…]
(e) provide for the termination of employment*, or the demotion to a position at a lower maximum rate of pay,* ***of persons employed in the public service for reasons other than breaches of discipline or misconduct*** *….*	***e)*** *prévoir, pour des raisons autres qu'un manquement à la discipline ou une inconduite, le licenciement ou la rétrogradation à un poste situé dans une échelle de traitement comportant un plafond inférieur d'une personne employée dans la fonction publique;* […]

[Emphasis added]

[308] Section 12(3) of the *FAA* provides that a termination of employment under s. 12(1)(e) may be made only for cause.

[309] Although a distinction is made between disciplinary and non-disciplinary terminations, both types of dismissals must be for cause.

[310] To determine whether the employer had cause to terminate the grievor's employment on June 9, 2021, I must examine the circumstances that led to the termination and apply the relevant legal principles. According to the opening paragraph of the termination letter, the termination was the consequence of the grievor failing or refusing to participate in the FTWE process.

[311] In the months that led to the termination date, the parties engaged in a series of correspondence about the employer's request for an FTWE It clearly explained the

consequences if he failed to provide it with the requested information. The evidence demonstrates that he clearly understood those consequences, and several times, he goaded it to send him his termination letter by email.

[312] Two competing values that must be balanced in this case are the employee's privacy and right to bodily integrity and the employer's obligation to ensure a safe workplace. The balance struck between these two competing values in labour law jurisprudence was explained in *Grover*, as follows:

> …
>
> *[65] … employers have the right to know more about an employee's medical information if there are reasonable and probable grounds to believe the employee presents a risk to health or safety in the workplace.*
>
> *[66] It does not follow that an employer can automatically demand that an employee undergo a medical examination. Rather, to balance the employee's right to privacy and bodily integrity, the employer must explore other options to obtain the necessary information. If the employer is dissatisfied with these other options, including and in particular a medical certificate tendered by the employee, it has the duty to clearly explain to the employee or state the reasons why the information is insufficient. Again, this respects the employee's rights to privacy and allows him or her to assess the employer's objections and produce other information if needed. It is only after all of these steps have been canvassed that an employer can in certain instances insist that an employee must attend a doctor chosen by the employer.…*
>
> …

[313] In *Grover*, the Court held that the onus was on the employer to adduce cogent evidence to support its request for a medical examination. I must assess whether the employer provided such evidence in this case.

[314] In *Burke 2019*, which the grievor relied on, the Board concluded that the employer had failed to meet the higher standard required to demonstrate "reasonable and probable grounds" for requesting a psychiatric evaluation as a condition of allowing the employee to return to the workplace.

[315] Adjudicator Olsen examined the employer's evidence and found that the reasons provided for requesting a psychiatric evaluation were tentative and that there was no reference to a psychiatric examination in the letters provided to the doctors. The nature of the evaluation emerged only during the cross-examination of the

employer's witness. Furthermore, the fact that the employer referred to possible discipline for Mr. Burke's behaviour was consistent with its tentative view that there was only a possibility that Mr. Burke suffered from a mental disability (see *Burke 2019*, at paras. 424 to 433).

[316] In this case, the employer had not yet made any determination as to culpability, specifically about the Watch List email and more generally about the aggressive nature and inappropriate tone of the grievor's communications.

[317] Furthermore, both Mr. Côté and Mr. Charette were clear in their evidence that they were concerned about the grievor's overall health and mental well-being, given the nature and rampancy of his email communications.

[318] The fact that the grievor initially consented to obtain the required information from his physician is indicative of his acceptance that the employer required it.

[319] I find the facts in *Hood* to be like those in this case, in which the employer's request for an independent medical evaluation was precipitated by the grievor's behaviour in the workplace. The Board stated this:

> …
>
> ***117*** *The picture that emerges from the evidence is that of an* ***employee who was experiencing a great deal of stress in the workplace, and the stress was longstanding. There were clear signs that the grievor was troubled****.…*
>
> ***118 Most employers are not doctors, psychologists or psychiatrists. They have few tools at their disposal to deal with employees who demonstrate signs of distress in the workplace****. And yet, as the Federal Court held in* Grover*, employers have an obligation to ensure the health and safety of employees in the workplace. One of the tools available to employers is the right to require an employee to undergo a FTW assessment. As the Federal Court held in* Grover*, it is not a tool to be used lightly or punitively but when there are "…* ***reasonable and probable grounds to believe the employee presents a risk to health or safety in the workplace." In my view, that test must include a reasonable concern that the employee in question presents a risk to herself or himself. I do not believe that a responsible employer could ignore the signs of stress and instability exhibited by the grievor in the months preceding her suspension on January 8, 2010. Therefore, I find that the employer was justified in requiring that she undergo an independent medical examination to determine her fitness to work****.***

…

[Emphasis added]

[320] The employer referred me to numerous cases that dealt with workplace threats. The grievor attempted to distinguish them by arguing that they involved physical threats, while he had no history of any physical violence. When he stated that he would defend himself by any and all means, he referred to the judicial and administrative recourses available to him, not physical violence. He argued that the employer did not ask him what he meant by the statements. He never volunteered an explanation to the employer, even though he knew from the very beginning that those statements were of concern to it. He did nothing to assuage its concerns.

[321] I agree with the cases that the employer cited to support the proposition that an employer has an obligation to take workplace threats seriously. While the grievor might not have been explicit in his statement about defending himself "by all [and] any mean[s]", the context in which that statement was made, and his statements about how he was feeling psychologically harassed to the point that he wanted to take leave from the workplace, were sufficient to trigger a duty to inquire on the employer's part. The circumstances also warranted that it took some action.

[322] In *Ricard*, the grievor was alleged to have made threats of physical violence against her supervisor. She denied that she made the alleged threats and suggested that the employer's witnesses had lied; however, she offered no motive as to why they would have lied. Based on the evidence, the adjudicator found that the grievor made the statements and dismissed her suggestion that even if the statements were made, they might have been a joke. The adjudicator stated this:

…

> *125 I find that the grievor made the statement ascribed to her by Ms. Hall.* ***Only the grievor really knows whether she meant it as a joke. In my opinion, the question is not relevant. An employer must take seriously any statement that amounts to a threat of violence in the workplace****. The notion that an employee could take a gun into the workplace to shoot someone is no longer as far-fetched as it ought to be, and employers cannot take the risk when confronted with such a threat. Protecting employees is a paramount and legitimate concern.…*

…

[Emphasis added]

[323] I draw a parallel in this case. Only the grievor knew what he meant by the words that he used in his email. He did not share what he meant with the employer, although he knew that the employer found it concerning. In any event, as the Board stated in *Ricard*, what the grievor meant is not the relevant inquiry. Employers must take seriously statements or utterances that amount to a threat of workplace violence.

[324] In this case, I find that in January 2020, the employer had legitimate concerns, given the numerous emails that the grievor sent over a short period, as well as their threatening nature and tone. Not only was the employer concerned about workplace safety, but also, it was concerned about his overall state of health, given the signs of stress that he had exhibited. As FTWE suspension email stated, the "… numerous emails and their content raise significant concerns vis-à-vis [the grievor's] overall well-being and current state of mind."

[325] I find that there was ample evidence to support the employer's concerns.

[326] The grievor appeared to fundamentally mistrust the employer, such that it appeared to have clouded his perception and judgment of the issues. He laced his emails to the employer with allegations of racial discrimination and Islamophobia, without any supporting facts. For instance, on June 3 and 10, 2020, when dealing with one of his grievances, Mr. Côté wrote to the grievor with the following salutation: "Hi Ghani". The grievor took umbrage at the salutation and emailed Mr. Côté, stating: "Good morning Sir, Another note, you always referred [*sic*] me by my surname ('Mr. Osman') and treated me differently. You do not need to call me by [*sic*] first name now. I accept that you view me as a 'dangerous black man' I would appreciate that." Shortly after that exchange, he asked that he correspond with someone other than Mr. Côté.

[327] The irony of the grievor's position is that he always signs his emails as "Ghani". Furthermore, he never asked Mr. Côté to address him as "Mr. Osman" and not to address him using his first name. If he felt offended by the salutation used in the June 3 and 10, 2020, emails, he could simply have told Mr. Côté not to address him by his first name, without imputing any racist intent to Mr. Côté.

[328] He made similar racism accusations against Mr. Charette.

[329] In my view, such bald accusations of racism are unhelpful. Public service managers have responsibilities to manage workplaces and employees, which are often not easy, particularly when dealing with workplace health-and-safety issues and medical evaluations. Conversations around these topics are difficult. The dialogue is not advanced by bald allegations of discrimination.

[330] I do sympathize with the grievor that in his lived experience as a Somali-Canadian living in a metropolitan hub such as Toronto, he might have been subjected to heightened scrutiny, stereotyping, and other microaggressions. This does not mean that there are crouching racist tigers and hidden Islamophobic dragons in every interaction.

[331] I find that the grievor's obsession with finding discrimination in every dialogue with the employer particularly disabling and ultimately unhelpful. Had he provided Dr. Cooke's assessment or allowed the employer to approach Dr. Cooke in an effort to expedite the process, he would have saved himself considerable stress.

[332] The grievor posed a legitimate question to the employer as to why the April 2019 evaluation report was not sufficient for its needs.

[333] A review of the 2019 and 2020 requests demonstrates the differences in the information that the employer required.

[334] The 2019 request for a medical update dealt with two specific functional limitations identified in a previous medical note, namely, the grievor's ability to work in a team environment, and his ability to work in an external client service environment.

[335] The 2020 request specifically addressed the behaviours that management observed in December 2019 and January 2020. Specifically, management required information as to any functional limitations or restrictions that had to be accommodated in the workplace based on the threats and aggressive tone of his emails during that period. It requested the following information:

> …
>
> *… Does Mr. Osman have any functional limitations or restrictions that need to be accommodated in the workplace? Please specify the limitations or restrictions and whether they are permanent or temporary.*

> *… If Mr. Osman has functional limitations:*
>
> *a) Does it impact his ability to complete the duties associated with his position in a manner as to respect the values and behaviours established within the ESDC Code of Conduct? If so, please explain.*
>
> *b) Is there a causal relation between Mr. Osman's medical condition and the behaviour stated above? If so, please explain.*
>
> *c) Are there any triggers that may or could impact Mr. Osman in the workplace? If so, please provide details and any measures that could be implemented to help.*
>
> *… Does Mr. Osman represent a danger to himself and/or to others in the workplace? To this end, and based on his email of January 7, 2020, is there reason to believe that he could present a danger specifically to* [GC]*?*
>
> …

[336] The grievor took issue with the question of whether there was any reason to believe that he could present a danger to GC, based on the Watch List email. He interpreted this to mean that the employer branded him as a violent Black man. He testified that he has no history of violence and that the employer ought to have asked him to explain what he meant by this: "… I will defend myself by all [and] any mean[s]. I am not afraid of anymore [*sic*] consequences from now on." Had it asked him to explain, he would have told it that he meant using administrative recourses and that he is not a violent person.

[337] The employer did not ask what he meant by that statement. But right from the outset, the grievor knew that that was part of its concern; therefore, he could have explained himself to it, but he did not. He could not then turn around and blame the employer. Although he testified that he meant administrative recourses, he never articulated what he meant by "consequences from now on."

[338] He also knew that the FTWE was a condition for his return to work, and he was adamant that he would not provide that information to the employer.

[339] The grievor failed to provide the information that the employer required to reintegrate him into the workplace. He made an informed decision in March 2021 when he categorically told that employer that he would not consent to an FTWE by the IME. Curiously, he was silent on whether he would provide the report from his physician. His position all along was that he wanted to wait for his physician to provide the

report, but he did nothing to ensure that the report was forthcoming, nine months after his June 10, 2020, examination by Dr. Cooke.

[340] He resisted the employer's offer to contact Dr. Cooke directly, to ascertain if the report could be expedited. He effectively made it impossible for the employer to responsibly return him to the workplace.

[341] The grievor was given ample opportunity to provide a report from his treating physician on any functional limitations and on his fitness to work. He left the employer with no choice but to terminate his employment.

[342] I find that the termination of his employment under s. 12(1)(e) of the *FAA* was for cause.

VI. Sealing Order

[343] As noted above, portions of the documents provided by the grievor were already redacted to protect personal information such as private email addresses and dates of birth which were not necessary for the determination of the matters at issue.

[344] The Board's Policy on Openness and Privacy states as follows:

> …
>
> *Parties and their witnesses are subject to public scrutiny when giving evidence before the Board. When the identity of a party and a witness is publicly known, the reliability of their testimony is enhanced. Board decisions identify parties and their witnesses by name and may set out information about them that is relevant and necessary to the determination of the dispute.*
>
> *At the same time, the Board acknowledges that in some instances, mentioning an individual's personal information during a hearing or in a written decision may affect that person's life.*
>
> ***Privacy concerns arise most frequently when some identifying aspects of a person's life become public. These include an individual's home address, personal email address, personal phone number, date of birth, bank account number, SIN, PRI, driver's license number, or credit card or passport details. The Board endeavours to include such information only to the extent that is relevant and necessary for the determination of the dispute.***
>
> …
>
> ***It is recommended that the parties redact information that is not necessary to their case before sending it to the Board and***

> ***before introducing it into evidence at the hearing. Examples of such information include a PRI, information about someone not a party to the case (e.g., a person's or a company's financial information, a family member's medical information, etc.), medical information (e.g., health card number, date of birth, etc.), security information, financial details (e.g., tax information, SIN, bank account number, salary, etc.), and personal home and email addresses.***
>
> *In exceptional circumstances, the Board departs from its open justice principles. When it does, it may grant requests to maintain the confidentiality of specific information and evidence and may tailor its decisions to accommodate the protection of an individual's privacy (including holding a hearing in private, sealing exhibits containing sensitive medical or personal information, or protecting the identities and information of witnesses or third parties).*
>
> …
>
> [Emphasis added]

[345] As a matter of practice, the parties appearing before the Board routinely redact personal information as outlined above in the Board's policy. I have noted that the redactions in the documents submitted were of this nature; therefore, they will remain.

Complainant's medical information

[346] In his complaint dated January 1, 2020, he stated:

> *In April 2019 Dr. Cooke completed his assessment of me, and I forwarded the assessment to management. (Exhibit C1 – C4) I would respectfully make a request to the Board to seal my personal health record.*

[347] There are three documents that contain sensitive personal medical information of the complainant: a) letter dated April 10, 2019, from Dr. Robert G. Cooke to Ms. Lily Keoshkerian, Service Manager, Citizen Services Branch, Service Canada; and b) letter dated October 1, 2018, from Lily Keoshkerian requesting an updated medical assessment; c) letter dated January 21, 2020 from Charles Coté, re: Ghani Osman - Request for medical assessment.

[348] During the proceeding, neither party offered any arguments in relation to the request that the complainant's personal health record be sealed.

[349] In *Sherman Estate v. Donovan*, 2021 SCC 25, the Supreme Court of Canada outlined a three-step test to be applied by a decision-maker when ordering a discretionary limit on the open court principle, such as a sealing order. It must be established that:

> a) court openness poses a serious risk to an important public interest,
> b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk, and
> c) as a matter of proportionality, the benefits of the order outweigh its negative effects. (*Sherman Estate* at paragraph 38)

[350] Elsewhere the court ruled that "protecting individuals from the threat to their dignity that arises when information revealing core aspects of their private lives is disseminated through open court proceedings is an important public interest for the purposes of the test" (*Sherman Estate*, paragraph 73). Further, the court recognized that the catalogue of the range of personal information that, if exposed, could give rise to a serious risk, includes "stigmatized medical conditions" and information that reveals "something intimate and personal about the individual, their lifestyle or their experiences" (*Sherman Estate* at paragraph 77).

[351] This Board has recognized that medical information of persons appearing before this board is worthy of protecting in appropriate circumstances. In *Employee X v. Canada Revenue Agency*, 2017 PSLREB 18, the Board sealed the grievor's "highly detailed medical record" (see paragraph 59). Similarly in *Matos v. Treasury Board (Canada Border Services Agency)*, 2024 FPSLREB 7, the sealed the grievor's medical records and other personal information that were introduced and marked as exhibits at the hearing. (see also: *Wercberger v. Canada Revenue Agency*, 2016 PSLREB 41 at paragraph 66).

[352] As in the cases cited above, I agree that the medical information of the complainant should be sealed.

[353] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

VII. Order

[354] The Board orders that the grievor's medical information contained in the following Exhibits be sealed:

a) Exhibit 1, Joint Book of Documents, volume 1, p. 14 - Letter dated April 10, 2019, from Dr. Robert G. Cooke to Ms. Lily Keoshkerian, Service Manager, Citizen Services Branch, Service Canada.

b) Exhibit 1, Joint Book of Documents, volume 1, pp. 15-17, letter dated October 1, 2018, from Lily Keoshkerian requesting an updated medical assessment.

c) Exhibit 1, Joint Book of Documents, volume 1, pp. 65-68 - Letter dated January 21, 2020 from Charles Coté, re: Ghani Osman -Request for medical assessment; and

d) Exhibit 2, Joint Book of Documents, volume 2, pp. 55-62 - Letter dated January 21, 2020 from Charles Coté, re: Ghani Osman - Request for medical assessment.

[355] The grievance in Board file no. 566-02-42421 is denied.

[356] The complaints under s. 133 of the *Code* in Board file nos. 560-02-41418 and 43143 are dismissed.

[357] The grievance in Board file no. 566-02-43435 is denied.

December 20, 2024

Caroline E. Engmann,
a panel of the Federal Public Sector
Labour Relations and Employment Board

APPENDIX A

For the employer:

Bergey v. Canada (Attorney General), 2017 FCA 30;
Caron v. Canada (Attorney General), 2022 FCA 196;
Theaker v. Deputy Head (Department of Justice), 2013 PSLRB 163;
Atlantic Packaging Products Ltd. v. Graphic Communications Conference of the International Brotherhood of Teamsters, Local 100m, 2016 CanLII 84460 (ON LA) ("*A&P*");
Greater Vancouver Regional District v. Greater Vancouver Regional District Employees' Union, [2006] B.C.C.A.A.A. No. 23 (QL)("*Greater Vancouver*");
Corporation of the City of Guelph v. Canadian Union of Public Employees, Local 241, 2000 CanLII 29492 (ON LA);
Johnson Controls, L.P. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 222, [2006] O.L.A.A. No. 262 (QL);
Livingston Distribution v. Industrial, Wood and Allied Workers of Canada, Local 700, [2001] O.L.A.A. No. 32 (QL);
McCain Foods (Canada) v. United Food and Commercial Workers International Union, Local 114P3, [2002] O.L.A.A. No. 361 (QL);
Ricard v. Deputy Head (Canada Border Services Agency), 2014 PSLRB 72;
Robillard v. Treasury Board (Department of Finance), 2007 PSLRB 41;
Société des Casinos du Québec inc. v. Canadian Union of Public Employees, Local 3939, 2007 CanLII 80093 (QC SAT);
Toronto Transit Commission v. Amalgamated Transit Union, Local 113, [2005] O.L.A.A. No. 743 (QL);
Vancouver (City) v. Canadian Union of Public Employees, Local 1004, [2003] B.C.C.A.A.A. No. 285 (QL);
Wepruk v. Deputy Head (Department of Health), 2021 FPSLREB 75;
Baun v. Statistics Survey Operations, 2014 PSLRB 26;
Blackburn v. Treasury Board (Correctional Service of Canada), 2006 PSLRB 42;
Burke v. Deputy Head (Department of National Defence), 2014 PSLRB 79 ("*Burke 2014*");
Campbell v. Treasury Board (Canadian Radio and Television Commission), [1996] C.P.S.S.R.B. No. 35 (QL);
Canada (Attorney General) v. Grover, 2007 FC 28;
Hood v. Canadian Food Inspection Agency, 2013 PSLRB 49;
Layne v. Deputy Head (Department of Justice), 2017 PSLREB 10;
McLaughlin v. Canada Revenue Agency, 2015 PSLREB 83;
Ricafort v. Treasury Board (Department of National Defence), [1988] C.P.S.S.R.B. No. 321 (QL);
Tobin v. Treasury Board (Fisheries and Oceans Canada), [1990] C.P.S.S.R.B. No. 11 (QL);
Trépanier v. Treasury Board (Agriculture Canada), [1987] C.P.S.S.R.B. No. 34 (QL);
Western Grain By-Products Storage Ltd. v. Donaldson, 2015 FCA 62;
Lapointe v. Canada Revenue Agency, 2020 FPSLREB 19;
Larivière v. Treasury Board (Department of Employment and Social Development), 2019 FPSLREB 73;
Baun v. Statistics Survey Operations, 2018 FPSLREB 54;
Sainte-Marie v. Canada Revenue Agency, 2009 PSLRB 35;
Sousa-Dias v. Treasury Board (Canada Border Services Agency), 2017 PSLREB 62;
Vallée v. Treasury Board (Royal Canadian Mounted Police), 2007 PSLRB 52;
Bassett v. Treasury Board (Correctional Service of Canada), 2017 PSLREB 60;

Dodd v. Canada Revenue Agency, 2015 PSLREB 8;
Red Deer College v. Michaels, 1975 CanLII 15; and
University Health Network v. Ontario Nurses' Association [2012], 219 L.A.C. (4th) 237

APPENDIX A

For the grievor:

Chamberlain v. Treasury Board (Department of Human Resources and Skills Development), 2013 PSLRB 115;
Burke v. Deputy Head (Department of National Defence), 2019 FPSLREB 89 ("*Burke 2019*");
Attorney General of Canada v. Burke, 2021 FCA 18;
AA v. P.R.Y.D.E. Learning Centres Inc., 2020 HRTO 1020;
Public Service Alliance of Canada v. Treasury Board, 2022 FPSLREB 12;
Attorney General of Canada v. Frazee, 2007 FC 1176;
Irvine v. Gauthier (Jim) Chevrolet Oldsmobile Cadillac Ltd., 2013 MBCA 93;
Saumier v. Attorney General of Canada, 2009 FCA 51;
Bazrafshan v. Canada Post Corporation, 2014 CIRB 707;
Ouimet v. VIA Rail Canada Inc., 2002 CIRB 171;
King v. Deputy Head (Correctional Service of Canada), 2014 PSLRB 84;
Massip v. Canada (Treasury Board), [1985] F.C.J. No. 12 (C.A.)(QL); and
Potter v. New Brunswick Legal Aid Services Commission, 2015 SCC 10.